

1 STATE OF MINNESOTA DISTRICT COURT  
2 COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT  
3 - - - - -  
4 The State of Minnesota,  
5 by Hubert H. Humphrey, III,  
6 its attorney general,  
7 and  
8 Blue Cross and Blue Shield  
9 of Minnesota,  
10 Plaintiffs,  
11 vs. File No. C1-94-8565  
12 Philip Morris Incorporated, R.J.  
13 Reynolds Tobacco Company, Brown  
14 & Williamson Tobacco Corporation,  
15 B.A.T. Industries P.L.C., Lorillard  
16 Tobacco Company, The American  
17 Tobacco Company, Liggett Group, Inc.,  
18 The Council for Tobacco Research-U.S.A.,  
19 Inc., and The Tobacco Institute, Inc.,  
20 Defendants.  
21 - - - - -

22 TRANSCRIPT OF PROCEEDINGS  
23 VOLUME 43, PAGES 8271 - 8445  
24 MARCH 19, 1998  
25

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DIRECT EXAMINATION - ADAM B. JAFFE

1 P R O C E E D I N G S.  
2 THE CLERK: All rise. Ramsey County  
3 District Court is again in session, the Honorable  
4 Kenneth J. Fitzpatrick now presiding.  
5 (Jury enters the courtroom.)  
6 THE CLERK: Please be seated.  
7 THE COURT: Good morning.  
8 (Collective "Good morning.")  
9 THE COURT: Counsel.  
10 MR. GILL: Thank you, Your Honor.  
11 Good morning, ladies and gentlemen.  
12 (Collective "Good morning.")  
13 ADAM B. JAFFE  
14 called as a witness, being previously  
15 sworn, was examined and testified as  
16 follows:

17 DIRECT EXAMINATION (cont'd)  
18 BY MR. GILL:  
19 Q. Good morning, Professor Jaffe.  
20 A. Good morning, Mr. Gill.  
21 Q. Do you recall toward the end of the day  
22 yesterday you were discussing a number of exhibits  
23 that dealt with a verbal agreement, gentlemen's  
24 agreement not to conduct in-house animal testing?  
25 A. That's correct.

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1 Q. And the very last exhibit that we dealt with  
2 yesterday concerned the closure of RJR's biological  
3 testing facilities on March 19, 1970. Do you recall

4 that?  
5 A. That's correct.  
6 Q. Now Professor Jaffe, in your review of the  
7 defendants' internal documents, did you locate in the  
8 files of any of the other defendants any reference to  
9 an agreement between defendants not to conduct  
10 in-house animal testing?  
11 A. Yes, I did.  
12 Q. Would you turn, then, to Exhibit 2549.  
13 Professor Jaffe, this is a document that was  
14 produced by which defendant?  
15 A. BATCo.  
16 Q. In the upper left-hand corner it indicates that  
17 it is strictly private and confidential?  
18 A. That's correct.  
19 Q. It concerns a meeting with Dr. Helmut Wakeham,  
20 vice-president and director of research, Philip  
21 Morris Inc., 10th September 1970; is that correct?  
22 A. Yes.  
23 Q. And if you go to the final page of this  
24 document, do you find the initials of the author?  
25 A. Yes, DGF.

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1 Q. And he dated his initials on 16th September,  
2 1970?  
3 A. That's correct.  
4 Q. And DGF, are those initials familiar to you?  
5 A. Yes. I believe that's Dr. Felton, who was a  
6 BATCo scientist.  
7 Q. Now where in this report does Dr. Felton  
8 reference an industry agreement not to conduct  
9 in-house biological testing?  
10 A. On page two, in the paragraph under the heading  
11 "Philip Morris Affairs."  
12 Q. Why don't you take us through what Dr. Felton  
13 had to say about what he and Dr. Wakeham discussed  
14 with respect to that subject.  
15 A. Okay. Dr. Felton reports that Dr. Wakeham told  
16 him, "One result of the greater influence which  
17 Wakeham has with Mr. J. Cullman has been the  
18 agreement, albeit reluctant, to permit Philip Morris  
19 to do 'in-house' biological work. When this was  
20 first mooted, Wakeham was told that there was a tacit  
21 agreement between the heads of the US Companies that  
22 this would not be done."  
23 Q. Let me stop you right there.  
24 What is your understanding of the meaning of the  
25 term "mooted?"

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1 A. What it means is when it was first raised or  
2 suggested by Wakeham.  
3 Q. Now do any of the documents that you have  
4 reviewed in this case provide any support for the  
5 notion that Dr. Wakeham at some point suggested the  
6 need to conduct in-house biological testing to senior  
7 management at Philip Morris?  
8 A. Yes. There's a document from 1964, a report

9 that he produced in response to the Surgeon General's  
10 report, where he -- he lays out a suggested program  
11 for Philip Morris in response to that report that  
12 included biological research.

13 Q. Now there's a further reference in that second  
14 sentence to a tacit agreement. How would a tacit  
15 agreement relate to a verbal agreement or a  
16 gentlemen's agreement?

17 A. I think they're all basically the same idea.  
18 It's an agreement that is not written down but that  
19 is understood among the companies.

20 Q. Did you find any support in the documents that  
21 you reviewed for the notion that Dr. Wakeham was told  
22 there was a tacit agreement between the heads of the  
23 U.S. companies, and that this type of research would  
24 not be done?

25 A. Yes. We know that in 1964 he had advocated this  
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1 kind of program, and that in 1968, when he set about  
2 to write another memo advocating a similar program,  
3 we know that in the first draft of that memo he  
4 acknowledged that this proposal would be inconsistent  
5 with the gentlemen's agreement, which certainly  
6 suggests that somewhere between 1964 and 1968 he was  
7 told or learned about the existence of this  
8 agreement.

9 Q. And going outside the defendants' internal  
10 documents, did you come across any other information  
11 that would support the notion that Dr. Wakeham had  
12 been informed of this tacit agreement, verbal  
13 agreement, or gentlemen's agreement?

14 A. Well as we talked about yesterday in his  
15 deposition, he -- he said that he did know about this  
16 agreement.

17 Q. All right. Would you continue, professor.

18 A. Okay. It says, "Wakeham had countered by saying  
19 he knew that Reynolds, Lorillard and American were  
20 all undertaking some and that Liggett and Myers had  
21 never been party to the agreement."

22 Q. Now did you find in your review of the internal  
23 documents any support for the proposition that Dr.  
24 Wakeham had indicated concerns about the activities  
25 of Reynolds, Lorillard and American with respect to

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1 their compliance with this agreement?

2 A. Yes. This sentence is essentially a summary of  
3 several paragraphs of the document we looked at  
4 yesterday, the -- the memorandum entitled "NEED FOR  
5 BIOLOGICAL RESEARCH," in which Wakeham had laid out  
6 in his memo to Mr. Goldsmith precisely these concerns  
7 regarding Reynolds, Lorillard and American, as well  
8 as his view that Liggett & Myers had not been party  
9 to the agreement.

10 Q. All right. What else did Dr. Felton have to say  
11 about this conversation?

12 A. He goes on to say that, "Cullman had been  
13 incredulous" -- Cullman was the CEO of Philip

14 Morris -- "had been incredulous and had phoned  
15 Galloway, the President of R. J. Reynolds who had  
16 denied Reynolds were doing any bioassay." And then it  
17 says, "When Cullman had told Wakeham this, Wakeham's  
18 response had been to quote the Reynolds work on the  
19 Senkus smoking machine and to claim that he had floor  
20 plans showing outline area allocations."  
21 Q. Let me stop you again, professor. Did you find  
22 any support in the documents for the proposition that  
23 Cullman had had a conversation with Wakeham in which  
24 Cullman could have conveyed to Wakeham that Galloway  
25 had denied any involvement in any such research?

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1 A. Yes. As we saw yesterday, the memo from Mr.  
2 Cullman to Mr. Wakeham refers to a conversation that  
3 they had when Mr. Cullman went to Richmond, Virginia,  
4 sometime in late February 1970.

5 Q. And prior to that time, did you see any  
6 documents that would have suggested that Dr.  
7 Wakeham's superiors had been informed of Dr.  
8 Wakeham's views with regard to testing occurring at  
9 RJR that they might have passed along to Mr. Cullman?

10 A. Yes. The document to -- which was addressed to  
11 Mr. Goldsmith laid out Mr. Wakeham's concerns.

12 Q. So at some point in time, Wakeham and J. Cullman  
13 had had a conversation with respect to Dr. Wakeham's  
14 concerns.

15 A. That's correct. And as we discussed yesterday,  
16 we know that Mr. Wakeham did have -- or Dr. Wakeham  
17 did have in his possession floor plans of the  
18 Reynolds facility, because we saw the memorandum from  
19 Mr. Carpenter to Dr. Wakeham which contained as an  
20 attachment literally floor plans of the Reynolds  
21 facility. So Wakeham had those floor plans and could  
22 well have showed them to Mr. Cullman when they met in  
23 Richmond in late February of 1970.

24 Q. And please continue.

25 A. It says, "This too had been relayed to Galloway

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1 by Cullman," meaning that Mr. Cullman, the CEO of  
2 Philip Morris, had told Galloway, the CEO of  
3 Reynolds, that Cullman had floor plans showing the  
4 Reynolds research facility where animals were used,  
5 it says, "This too had been relayed to Galloway by  
6 Cullman, incredible though it may seem, and Galloway  
7 had visited the Reynolds Research Department to find  
8 it was substantially true."

9 Q. Now let me ask you, Professor Jaffe, if Mr.  
10 Galloway, the president and CEO of RJR Tobacco, had  
11 visited the research facilities of RJR sometime  
12 between late February 1970 and March 19, 1970, what  
13 would he have found?

14 A. Based on the documents including the floor plans  
15 that Dr. Carpenter had, he would have found a  
16 facility that was doing animal -- in-house animal  
17 research related to smoking and health.

18 Q. What is your interpretation, professor, of the

19 significance of Dr. Felton's expression, "incredible  
20 though it may seem?"  
21 A. Well --  
22 MR. BLEAKLEY: Your Honor, I object, that  
23 calls for speculation.  
24 THE COURT: You may answer that.  
25 A. I think what it shows is that Dr. Felton had the  
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1 same reaction to this chain of events that I had,  
2 which was the notion that the CEO of one company  
3 would call up the CEO of a competitor and tell them  
4 "I know you're doing research of a certain kind which  
5 I think you shouldn't be doing," is incredible.  
6 That's not the behavior that -- "incredible" in the  
7 sense of hard to believe, not "incredible" in the  
8 sense of he wouldn't believe that it happened.  
9 That's not the kind of behavior that competitors  
10 engage in, and the notion that Galloway took those  
11 calls or paid any attention to them would not be the  
12 kind of behavior you would expect from competitive  
13 firms.

14 Q. What else did Dr. Felton have to say?

15 A. Well he says at the bottom of the page, "There  
16 had been a sudden reorganization at Reynolds,  
17 resulting in the closure of the biological section,  
18 the severance of product development (which remained  
19 with the tobacco division) from the research  
20 department (which became a corporate activity) and  
21 ultimately the resignation of Dr. Eldon Nielsen, who  
22 had been in charge of biology."

23 Q. Now Professor Jaffe, based upon Exhibit 12756,  
24 which we discussed at the end of yesterday's session  
25 dealing with the closure of the biological facilities

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1 at RJR, is it your opinion that the closure was  
2 sudden, as expressed in this particular exhibit?

3 A. Yes. We saw that Dr. Senkus said that in his  
4 speech.

5 Q. And what about the remaining information that's  
6 contained at the top of the page that's now on the  
7 screen, is there any support for that information in  
8 the -- in Exhibit 12756?

9 A. Yes. We do know that Dr. Nielson was the head  
10 of biology, that was referred to in the memorandum  
11 from Mr. Carpenter describing his visit to the  
12 facility, and we also know that Dr. Nielson did  
13 eventually leave Reynolds based on Dr. Senkus's  
14 deposition where he confirmed that that had in fact  
15 occurred.

16 Q. Now do you recall that there were questions put  
17 to Dr. Senkus in his deposition with respect to the  
18 timing of the departure of Dr. Nielson?

19 A. Yes.

20 Q. Now as we have previously seen, the meeting  
21 between Wakeham and Felton occurs on September 10 of  
22 1970, approximately six months after the closure.

23 A. That's correct.

24 Q. Now what is your recollection of Dr. Senkus's  
25 recollection of the timing of Dr. Nielson's departure  
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1 with respect to the specific matter of whether or not  
2 it occurred before or after September 1970?  
3 A. Dr. Senkus couldn't recall whether Dr. Nielson's  
4 departure from Reynolds had been before or after  
5 September of 1970.  
6 Q. Do you recall the explanation that Dr. Senkus  
7 gave for the closure of RJR's biological facilities?  
8 A. Yes.  
9 Q. What was it?  
10 A. Well it was not very clear, but the gist of it  
11 was that there had been some kind of management  
12 change or broader reorganization at Reynolds, and  
13 that that had been the reason for this -- the  
14 termination of the biological research in North  
15 Carolina.  
16 Q. A change in the viewpoint of management with  
17 respect to this type of work?  
18 A. Yes.  
19 Q. Now I'll ask you -- and --  
20 And of course what we've seen from the documents  
21 so far is that Mr. Galloway was the president and CEO  
22 of RJR Tobacco.  
23 A. That's correct.  
24 Q. Now I'd like you to assume, based upon answers  
25 to interrogatories that have been supplied by

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1 defendants in this case, that Mr. Galloway continued  
2 to be the president and CEO of RJR Tobacco until June  
3 18, 1970, when he was replaced by William Smith.  
4 Would those facts be consistent with Dr. Senkus's  
5 explanation?  
6 A. They don't seem to be, since he was suggesting  
7 that it was a change in management that was the  
8 explanation for the termination of the biological  
9 research in March of 1970.  
10 Q. Based upon everything that we have discussed  
11 this morning and yesterday, do you have any  
12 opinion -- have you reached any opinion with respect  
13 to the accuracy of the account of this incident that  
14 is contained in Dr. Felton's report?  
15 MR. BLEAKLEY: Objection, Your Honor, calls  
16 for speculation. Also invading the province of the  
17 jury.

18 THE COURT: Sustained.  
19 BY MR. GILL:  
20 Q. If Dr. Felton's report were accurate, Professor  
21 Jaffe, what would be the significance of these  
22 events?

23 A. Well what we have here, if this report is  
24 accurate -- and Dr. Wakeham in his deposition didn't  
25 dispute the accuracy of this report, he said that he

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1 did meet with Dr. Felton but couldn't recall whether  
 2 he had discussed these matters with Dr. Felton -- and  
 3 if this is accurate, then what we have here is -- is  
 4 a blatant example -- (clearing throat) excuse me --  
 5 of communications at the absolute highest levels of  
 6 these two companies in a successful attempt to  
 7 suppress in-house animal research, which, as we've  
 8 discussed, was a component of this agreement. And  
 9 this research is a competitive activity -- or it  
 10 should have been a competitive activity that, if  
 11 these firms were competing, should not have been  
 12 discussed, and certainly the CEO of Reynolds should  
 13 not have terminated this activity as a result of a  
 14 conversation with the CEO of Philip Morris.

15 Q. Was the closure of this biological facility in  
 16 the competitive interests of RJR?

17 A. No, I don't think so. I think we've seen in the  
 18 documents of several of the companies how, from a  
 19 competitive point of view, it was very important to  
 20 do this kind of research and in fact important to do  
 21 it in-house, and so from the competitive perspective  
 22 of Reynolds, this would have been something that they  
 23 would have wanted to continue.

24 Q. Absent a collusive agreement, Professor Jaffe,  
 25 can you conceive of any other explanation for this

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1 conduct?

2 MR. BLEAKLEY: Objection, Your Honor, calls  
 3 for speculation.

4 THE COURT: You may answer that.

5 A. Absent a collusive agreement, I can't see any  
 6 explanation for this conduct, if I include in this  
 7 conduct the discussions between Mr. Cullman and Mr.  
 8 Galloway.

9 Q. All right. Professor, do you recall that among  
 10 the concerns that Dr. Wakeham had been expressing,  
 11 one of his concerns was that American Tobacco had  
 12 been violating the agreement not to conduct in-house  
 13 animal testing?

14 A. That's correct.

15 Q. Based upon your review of the industry's  
 16 internal documents, was Dr. Wakeham correct in his  
 17 concerns?

18 A. No, he wasn't, not regarding American.

19 Q. All right. Let's turn to Exhibit 21951, please.  
 20 This exhibit was produced by what company, professor?

21 A. American Tobacco.

22 Q. And it is a "CONFIDENTIAL MEMORANDUM TO MR.  
 23 HETSKO RE CONFERENCE WITH MESSRS. HARLAN AND HARLOW  
 24 ON WEDNESDAY, AUGUST 25, 1965, AT" -- or "AMERICAN  
 25 TOBACCO LAW LIBRARY;" is that correct?

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1 A. That's correct.

2 Q. Who was Mr. Hetsko?

3 A. I believe Mr. Hetsko was the general counsel of  
 4 American Tobacco.

5 Q. And who was --  
6 Who were Messrs. Harlan and Harlow?  
7 A. Harlan and Harlow were scientists or researchers  
8 at the American research facility.  
9 Q. And who is the author of this memorandum?  
10 A. The author is an outside attorney for American  
11 named Janet Brown.  
12 Q. All right. The second paragraph on the first  
13 page reads, "I" --  
14 That would be referring to Janet Brown?  
15 A. That's correct.  
16 Q. -- "opened with the explanation that we were  
17 there at your request."  
18 "Your" would refer to whom?  
19 A. Mr. Hetsko.  
20 Q. "Our only purpose was to explore with them," --  
21 And that would be whom?  
22 A. Dr. Harlan and Dr. Harlow.  
23 Q. -- "first, the background, purposes and proposed  
24 modus operandi of the postulated, quote, biological,  
25 unquote, program which you had only recently learned  
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1 about, and second, to review some of the most  
2 fundamental problems a program of the nature  
3 indicated in Mr. Harlow's memorandum to you would  
4 pose for the Company in its public, medical and legal  
5 positions in the health controversy."  
6 What is the significance of what Ms. Brown is  
7 reporting in that introductory paragraph?  
8 A. Well what she's saying -- this is explained  
9 further later in the memorandum -- is that it had  
10 come to Mr. Hetsko's, the general counsel's attention  
11 that Harlan and Harlow and other scientists at  
12 American were about to embark on a program of  
13 in-house biological research, and that basically he  
14 had asked Janet Brown to come and speak to them about  
15 essentially why they shouldn't do that.  
16 Q. Would you expect that scientists in a  
17 competitive company would be reporting to lawyers  
18 with respect to their intentions to conduct  
19 biological research?

20 MR. BLEAKLEY: Objection, Your Honor, that  
21 calls for speculation. That's not within his  
22 competence.

23 THE COURT: Sustained.

24 Q. Let's go on, Professor Jaffe. The final  
25 sentence of that paragraph reads, "You would, I

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1 explained, wish to review these matters with them  
2 (and us) again on your return, and perhaps with  
3 Messrs. Hager and Heimann as well."

4 Do you know who Mr. Heimann is?

5 A. Yes. I think at this time Mr. Heimann was the  
6 president of American Tobacco.

7 Q. Or as of 1965, at least a very senior executive  
8 prior to becoming the president and CEO of American  
9 Tobacco; is that correct?



10 A. Okay.  
11 Q. Now what does this indicate with respect to  
12 referencing that these matters may be discussed not  
13 only between the lawyers and the scientists, but also  
14 senior management?

15 A. Well I think it would just indicate that this  
16 was an important issue, an issue of significant  
17 concern for the company.

18 Q. All right. It goes on to state, "At the  
19 conclusion of our conference Harlow stated that the  
20 opinion that the program contemplated would make the  
21 Company's past and current position in the health  
22 fields 'untenable'. Harlan thought, quote, we'll  
23 have to give it up, bracket, the program, bracket,  
24 end quote. Harlow ultimately stated that, while the  
25 program was important and he wanted very much to do

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1 it, he would certainly not want to do anything that,  
2 quote, has an impact on the Company's position or if  
3 it makes that position any less sound than it now  
4 is,' end quote.

5 How would this type of a program, suggested by  
6 Harlow, have fit into the process of creative  
7 destruction?

8 A. Well I think, as indicated by Harlow when he  
9 says it's important and he wanted to do it, this kind  
10 of research program is among the kinds of research  
11 that the company would have to be doing if it was  
12 going to engage in -- competitively in the process of  
13 creative destruction, because as we'll see later in  
14 the document, they understood that from a competitive  
15 point of view this was research that they needed to  
16 be doing and that it was important that they be doing  
17 it in-house.

18 Q. Did Ms. Brown go on in her memorandum to report  
19 on the origin of the idea to engage in this type of a  
20 program?

21 A. Yes.

22 Q. All right. If you'd look at page seven, please.  
23 Directing your attention to the middle of the page,  
24 there is a section that deals with the genesis of  
25 proposed biological research program.

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1 A. That's correct.

2 Q. What generally is being reported in this section  
3 of the memorandum, professor?

4 A. Well what's being reported here by Ms. Brown is  
5 what the scientists told her about why they had made  
6 the decision that it was important to undertake this  
7 new in-house biological program.

8 Q. And apparently there were two motives?

9 A. That's correct.

10 Q. And what were the two motives?

11 A. Well it says there right under the heading, "Two  
12 prime motives engendered the move to institute a  
13 Company biological research program. One was deep  
14 dissatisfaction with the conduct of experimental work

15 by independents in this area." And "The other was  
16 the need for commercial security in the development  
17 of new products."

18 Q. What does "independents" refer to?

19 A. "Independents" here refers to outside  
20 researchers who American had been using to do some  
21 biological research on a sort of, quote, outhouse  
22 basis rather than an in-house basis, and what Harlan  
23 and Harlow were reporting was that they were very  
24 dissatisfied with what that was producing for the  
25 company in terms of the company's needs.

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1 Q. Does the memo go on to explore the basis for the  
2 two objections that the scientists had to having this  
3 type of work conducted by an outside research firm?

4 A. That's correct.

5 Q. All right. If we turn, I think, to the next  
6 page, the first full paragraph on that page starting  
7 out with "There is strong feeling, thus, that  
8 experimental work which has -- which has to be farmed  
9 out to others lacks the scientific standards the  
10 Company and the nature of the work demands."

11 What is the author referencing there and what  
12 further explanations of that concept were attributed  
13 to Messrs. Harlow and Harlan?

14 A. Well basically what they're saying is they feel  
15 that the quality of the work that was being done by  
16 the independents was not up to the standards of the  
17 company, contrary to Dr. Wakeham's explanation at his  
18 deposition that the reason this work was going to be  
19 done on the outside was because the companies weren't  
20 competent to do it.

21 What the American scientists are saying is  
22 they're finding that they can't get competent  
23 outsiders to do it, and therefore it's important for  
24 them to do it in-house so that they can maintain the  
25 scientific standards that they wish to maintain.

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1 Q. You referenced Dr. Wakeham's testimony at his  
2 deposition in this case on that subject.

3 A. That's correct.

4 Q. What had Dr. Wakeham said on this subject in  
5 internal memorandum -- internal memoranda prior to --  
6 well prior to the date of his deposition?

7 A. Well as we discussed briefly yesterday, Dr.  
8 Wakeham also, when he was writing memos at the time  
9 in the 1960s, had made arguments similar to the  
10 arguments that Dr. Harlan and Dr. Harlow were making  
11 about why it's important to do this research in-house  
12 rather than through contracts with independents.

13 Q. Did Harlan and Harlow provide Ms. Brown with  
14 specific examples in support of their views?

15 A. Yes, they did.

16 Q. All right. If you go to the next page, page  
17 eight, about the fourth line down from the top of the  
18 page --

19 A. Yes.

20 Q. Are we on page eight? There we go. Fourth line  
21 from the top, please.  
22 A. Wait, you want the --  
23 Q. I'm sorry, I've been misspeaking. We need page  
24 nine. And I need to go see my optometrist with  
25 respect to these glasses.

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1 All right. "For example....," would you carry it  
2 from there, Professor Jaffe?  
3 A. Sure. It says, "For example, Foster Snell's  
4 techniques for measuring nicotine (in connection with  
5 Carlton) were so imperfect that their technicians  
6 failed to find any nicotine at all on the first  
7 series of tests. The laboratory had to reconstruct  
8 all their procedures (and, says Harlan, Company  
9 employees in effect ran the tests in the Company's  
10 laboratory). This is almost uniformly Company  
11 experience with independents. And Snell is one of  
12 the better consulting independents. In short,  
13 outside research caliber is not high, competence in  
14 problem analysis is dubious, and standards of  
15 technique development and execution have been far  
16 below the Company's own standards."  
17 Q. And in this memo, had Harlow and Harlan also  
18 registered concerns about security in connection with  
19 having the work done by outside consultants?  
20 A. Yes.  
21 Q. Okay. Now at some point in this memorandum does  
22 Ms. Brown address the scientists' understandings with  
23 respect to the potential value of doing this  
24 research?  
25 A. Yes.

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1 Q. And if we would go to page 11, please, in the  
2 middle of the page, what -- what was -- what is being  
3 discussed there, Professor Jaffe?  
4 A. Well she's again referring -- reflecting or  
5 recording what she was told, and she says, "To Harlan  
6 and Harlow this is obviously the arena of the maximum  
7 future commercial importance in terms of new  
8 products. And the fact that the biological work  
9 necessary to compete effectively in this area is so  
10 intimately involved with new products is the second  
11 compelling reason for wholly intra-Company work.  
12 Security is in peril where independents are involved.  
13 And the Company has no means whatever of insuring  
14 effective control in this important commercial and  
15 scientific area."  
16 Q. How do you rate the sophistication of these  
17 scientists with respect to their appreciation for the  
18 potential benefits of long-term product development?  
19 A. Well it seems clear that they -- they had a  
20 vision, that they understood that it was important  
21 that the future of the company, the competitive  
22 future of the company was intimately tied with this  
23 kind of research, and that not only was it important  
24 to do it, but that when you're doing research that is

25 of such tremendous commercial significance, you don't  
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1 want to be doing it with outsiders because you can't  
2 control the security of what they're doing and you  
3 can't control the process.

4 Q. Does the memo then go on to discuss the purposes  
5 of the type of research that Harlan and Harlow had in  
6 mind?

7 A. Yes, it does.

8 Q. I think going to the next page, near the -- the  
9 bottom third of page 12, it references that "The  
10 over-all purposes appear to be several fold:"

11 The first is "To develop techniques to measure  
12 and evaluate the biological effects of new American  
13 Tobacco Company, paren, and other, paren, products,  
14 and to compare new American Tobacco products, paren,  
15 among themselves and with others, close paren, with  
16 respect to such effects, paren, particularly in  
17 relation to ciliary function, close paren."

18 Now just taking this as an example, is the type  
19 of research that is being proposed there consistent  
20 or inconsistent with competitive behavior?

21 A. No, this kind of research would be very  
22 consistent with competitive behavior. They would be  
23 trying to do the research necessary to improve their  
24 products, to figure out how their products compare to  
25 other products, and to include them.

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1 Q. So comparing their products to other products in  
2 this context is not anti-competitive but it is  
3 pro-competitive.

4 A. Yes, I think so.

5 Q. Because who would benefit?

6 A. Well the outcome of this, if it was allowed  
7 to -- to reach fruition, would be that American would  
8 be trying to improve their products relative to its  
9 competitors, and the -- the customers, the smokers,  
10 would benefit.

11 Q. All right. Does the memorandum then go on to  
12 discuss Ms. Brown's assessment of the fundamental  
13 problems involved in pursuing this research?

14 A. Yes, it does.

15 Q. All right. Let's go on to page 25, please.  
16 Down at the bottom of that page, what is being  
17 discussed in this section, Professor Jaffe?

18 A. Well this --

19 The heading indicates that in this section of  
20 the memorandum they explore the fundamental problems  
21 posed by the proposed program.

22 Q. So the author states that in the afternoon she  
23 explained to the scientists at the outset that Mr.  
24 Hetsko had asked the three of them -- had asked Ms.  
25 Brown, and apparently there were some other attorneys

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1 that were with her from her law firm?  
2 A. That's correct.  
3 Q. So that's the reference to "us," she and two  
4 other lawyers from her firm?  
5 A. Yes.  
6 Q. To bring to the attention of Harlan and Harlow  
7 the most fundamental of the problems that Ms. Brown  
8 and her associates anticipated the company would face  
9 when it undertook the described program. And then  
10 down about in the middle of this next page, 26, does  
11 she reference that the program would be most likely  
12 viewed with respect to three potential descriptions?  
13 A. Yes. She indicates that it would be viewed as a  
14 biological research program, as a cancer research  
15 program, and as an animal research program.  
16 Q. With respect to the first of those, "as a  
17 biological research program into certain questions of  
18 tobacco use in relation to human health," does that  
19 phraseology have any familiar ring in terms of the  
20 documents that you've reviewed in this case?  
21 A. Well it describes really two things -- or  
22 there's two places we've seen similar language. It  
23 describes the kind of research that the Frank  
24 Statement said that the TIRC and then the CTR were  
25 going to do, and it also describes the kind of

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1 research that we know the gentlemen's agreement said  
2 that the companies were not going to do in-house.  
3 Q. And you mentioned the gentlemen's agreement, and  
4 I'm now attempting to display to the jury Exhibit  
5 30210. Were you referencing the language in the  
6 Frank Statement that reads, "We are pledging aid and  
7 assistance to the research effort into all phases of  
8 tobacco use and health?"  
9 A. Yes.  
10 Q. Now not to belabor this, Professor Jaffe, but  
11 with respect to the possibilities that the programs  
12 would be viewed in any of these three ways, would any  
13 of those ways be inconsistent with the process of  
14 creative destruction?  
15 A. No. All of these aspects of the research would  
16 be important parts of a competitive research program.  
17 Q. And do you recall whether Ms. Brown at some  
18 point in the memorandum reports on the history up to  
19 then of American Tobacco's efforts with respect to  
20 biological research?  
21 A. Yes.  
22 Q. I think you'll find that on page 31. It would  
23 be the first full paragraph that starts near the  
24 middle of the page.  
25 What is being reported there, Professor Jaffe?

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1 A. Well she said there "The Company has not, over  
2 the years, undertaken itself to initiate research in  
3 its own laboratories to discover any pathological  
4 effects of tobacco, nor has it conducted research in  
5 its own laboratories to refute or confirm any claims

6 of such effects asserted in the literature by others.  
7 The basis of that policy is that, as Mr. Hamner  
8 testified in Green, quote, that it is entirely out of  
9 our field of competence here, since this is a  
10 department, the staff of which is composed of  
11 chemists, physicists, and technical and scientific  
12 people trained in allied fields.'"

13 Q. How does Mr. Hamner's testimony in Green jibe  
14 with the opinions attributed to American Tobacco  
15 scientists Harlan and Harlow in this memorandum?

16 A. Well he's basically saying the opposite of what  
17 they said. They said that when they do it on the  
18 outside, that they have difficulty ensuring the  
19 quality, it's not up to their scientific standards,  
20 they would rather do it in their own laboratories so  
21 that they could be sure it was done right, whereas  
22 Mr. Hamner seems to be saying that they couldn't do  
23 it in their own laboratories.

24 Q. Does Ms. Brown then go on to explain specific  
25 problems that might accrue if this research were to

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1 proceed?

2 A. Yes.

3 Q. If you'd turn the page, down at the bottom of  
4 page 32, the last paragraph that starts on that page,  
5 what is being reported at that place?

6 A. Well she says, "If the Company can now inform  
7 itself respecting biological effects of smoking, it  
8 will be argued that it could and should have done so  
9 in all these areas, years ago. Ample funds were at  
10 the Company's disposal. Researchers with M.D.  
11 degrees were available to devise, conduct and  
12 evaluate experiments on animals and man. Laboratory  
13 facilities for such work could easily have been  
14 provided."

15 Q. Then she goes on to state, "What has been  
16 funded -- What has been found by independent  
17 scientists over the years, it will be argued, could  
18 have been found long since by the manufacturer whose  
19 primary responsibility it was."

20 Do you have any reason to disagree with any of  
21 the notions set forth by Ms. Brown in this paragraph?

22 A. No, not at all. It's certainly true they had  
23 ample funds that they could have hired researchers,  
24 that they could -- that they had laboratory  
25 facilities. As the scientists have explained,

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1 there's really no reason why they couldn't be doing  
2 this research themselves.

3 Q. In the middle of page 33, does Ms. Brown  
4 reference the crisis that arose in the 1950s?

5 A. Yes, she does.

6 Q. And what does she say about that?

7 A. She said, "It will be argued that, if such a  
8 program was not instituted earlier, it should at  
9 least have begun in 1950 to 1953, with publication of  
10 the four retrospective studies showing association

11 with lung and other cancers; or in 1953, with  
12 publication of the Wynder mouse-painting experiments,  
13 or in 1954, with publication of the first Hammond-  
14 Horn report, or in 1957, with publication of the  
15 Study Group report on Smoking and Health. Why were  
16 such programs not instituted, at least, in 1958, with  
17 publication of the final Hammond-Horn report, or in  
18 1959, with the publication by the Surgeon General of  
19 an official statement pronouncing a causal link  
20 between smoking and certain diseases, or in 1962,  
21 with publication of the report of the Royal College  
22 of Physicians, or, if not then, why not a year ago,  
23 with publication of the report of the Surgeon  
24 General's Advisory Committee."

25 Q. Is Ms. Brown posing rhetorical questions in this

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1 paragraph?

2 A. Yes, I think that's what she's doing.

3 Q. And what is a rhetorical question?

4 A. A rhetorical question is a question that you  
5 know the answer to.

6 Q. Now Professor Jaffe, as an economist, are you  
7 familiar with the term "unilateral action?"

8 A. Yes.

9 Q. Do economists view unilateral action as a  
10 specific form of competitive behavior?

11 A. Yes.

12 Q. What exactly does the term mean?

13 A. Well particularly in the context of an  
14 investigation of collusion, economists think about  
15 unilateral actions because if the behavior that we're  
16 seeing could be interpreted as unilateral action;  
17 that is, behavior by a single company acting not in  
18 cooperation with other companies, then that behavior  
19 would not be evidence of collusion.

20 Q. Now in this particular memorandum we're seeing  
21 an outside attorney for American Tobacco having a  
22 discussion with American Tobacco scientists and  
23 reporting to the general counsel of American Tobacco  
24 about the prospect of further conferences with  
25 high-ranking executives of American Tobacco.

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1 A. That's correct.

2 Q. Based upon all of that, do you consider that the  
3 restrictions on competitive behavior that this memo  
4 addresses would merely constitute some form of  
5 unilateral action with respect to the competitive  
6 behavior of American Tobacco?

7 MR. BLEAKLEY: Objection, that's very  
8 leading, calls for speculation, invades the province  
9 of the jury.

10 THE COURT: No. It is leading, though.  
11 You'll have to rephrase it.

12 MR. GILL: I'll be happy to rephrase it,  
13 Your Honor.

14 BY MR. GILL:

15 Q. What type of behavior, to your opinion, is being

16 discussed and described in this particular  
17 memorandum?  
18 A. Well I think if you were to look --  
19 If the only thing you looked at was this  
20 memorandum itself, and that was the only information  
21 you had, were the words of this memorandum, it  
22 wouldn't be possible to tell whether what was going  
23 on here was a unilateral decision on the part of  
24 American absent any communication with its  
25 competitors not to undertake this program, but I  
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1 think when you look at this document in the context  
2 of the other facts in the case, including American's  
3 participation in the meetings at the Plaza Hotel  
4 called by the CEO of American, as well as the role  
5 that Janet Brown played with other attorneys in the  
6 industry in devising the general industry approach to  
7 research questions and the role that Mr. Hetsko  
8 played on the Committee of Counsel meeting with the  
9 other generals counsel of the other companies in  
10 order to devise policy that related to research, I  
11 think that the most likely interpretation of this  
12 document is that this was not unilateral action, that  
13 this is evidence of American's continuing compliance  
14 with the agreement in the conspiracy not to engage in  
15 in-house animal research relating to smoking and  
16 health.

17 MR. BLEAKLEY: Your Honor, I move to strike  
18 that answer. It's invading the province of the jury.

19 THE COURT: No. He's an expert and I think  
20 he's entitled to give that opinion.

21 BY MR. GILL:

22 Q. In addition to performing his duties as general  
23 counsel of American Tobacco, are you familiar with  
24 any other duties that Mr. Hetsko had during this  
25 period of time?

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1 A. I don't recall.  
2 Q. Well let me -- let me ask you this, Professor  
3 Jaffe: Have you seen any documents indicating  
4 whether or not Mr. Hetsko, as general counsel of  
5 American Tobacco, participated in any discussions  
6 with the general counsel of any of the other  
7 defendant companies?

8 MR. BLEAKLEY: Objection, leading.

9 THE COURT: It is leading.

10 Q. Have you heard at any time or have you seen at  
11 any time in your review of defendants' internal  
12 documents reference to the Committee of Counsel?

13 A. Yes. As I've mentioned in my answer a couple  
14 answers ago, Mr. Hetsko was a member of the Committee  
15 of Counsel. I guess I didn't include that in my  
16 answer to your question because I'm not sure I think  
17 of that as sort of an official position. But he did  
18 participate with the Committee of Counsel, as I said.  
19 And as we'll see in some later documents, the  
20 Committee of Counsel was very much involved in



21 determining what kinds of research were going to be  
22 done in the industry.  
23 Q. And how, if at all, Professor Jaffe, would the  
24 documents authored and received by Dr. Wakeham with  
25 respect to his understanding with respect to a  
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1 gentlemen's agreement within the industry affect your  
2 opinion with respect to whether or not the events  
3 described in the Janet Brown memorandum were  
4 unilateral action on the one hand or participation in  
5 a collusive agreement on the other?

6 MR. BLEAKLEY: Objection, leading. Also  
7 calls for speculation. Also invading the province of  
8 the jury.

9 THE COURT: No, you may answer that.  
10 A. Well I think as we discussed, what Dr. Wakeham  
11 said and confirmed at his deposition was that there  
12 was an agreement, and that that agreement, the exact  
13 form of which may have been somewhat unclear, but  
14 clearly in-house animal research relating to smoking  
15 and health was the primary focus of it, and it was  
16 his understanding that that agreement included  
17 American, and I think that that's part of the factual  
18 framework in which you'd look at the document and  
19 evaluate it as evidence of American's compliance with  
20 that agreement.

21 Q. On what basis do you state that Dr. Wakeham  
22 assumed that American Tobacco was part of the  
23 agreement not to conduct in-house animal testing?

24 A. Well in the document we looked at yesterday, the  
25 1968 memorandum, he specifically says that -- I'm

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1 sorry, in the draft of the document we looked at  
2 yesterday, he says there was a gentlemen's agreement  
3 in the industry. He specifically notes that Liggett  
4 was not a party to it, and so the clear implication  
5 is that the other companies other than Liggett were  
6 in fact party to it.

7 Q. And had he been concerned about American  
8 Tobacco's violation of the agreement?

9 A. He was, yes.

10 Q. Now there's nothing in the memorandum authored  
11 by Ms. Brown that addresses the gentlemen's  
12 agreement; is there?

13 A. Not directly or explicitly, no.

14 Q. She does state reasons to Messrs. Harlan and  
15 Harlow as to why this research should not proceed.

16 A. That's correct.

17 Q. What do you make of the fact that, in her  
18 account of their meetings with respect to the content  
19 of this memorandum, that she does not appear to have  
20 informed Harlan and Harlow of the existence of the  
21 gentlemen's agreement?

22 MR. BLEAKLEY: Objection, leading.

23 THE COURT: It is leading.

24 Q. Have you --

25 In forming your opinion with respect to this

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1 particular issue, Dr. Jaffe, have you taken into  
2 account the absence of any indication that Ms. Brown  
3 informed the scientists of the existence of the  
4 gentlemen's agreement?

5 MR. BLEAKLEY: Still leading, Your Honor,  
6 Mr. Gill is testifying.

7 THE COURT: All right. Well I'll allow --  
8 I'll allow the answer.

9 A. Well I think that the most logical inference is  
10 that she didn't think it was necessary to tell these  
11 scientists about this agreement. She was able to  
12 convince them without doing so that this program  
13 should not be undertaken, and so she didn't -- she  
14 didn't feel it was necessary.

15 Q. Professor Jaffe, how, then, would you assess the  
16 impact of the prohibition against in-house animal  
17 research in terms of its contribution to the broader  
18 conspiracy to suppress fundamental competition within  
19 the U.S. cigarette industry on the smoking-and-health  
20 issue?

21 A. Well the agreement not to engage in in-house  
22 animal research supported the overall suppression of  
23 competition, really, in three ways. The first thing  
24 it did was that it inhibited the process of creative  
25 destruction, the process of long-term competition to

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1 come up with products that would truly deal with the  
2 health issue. And the reason it did that are the  
3 reasons that were articulated by Drs. Harlan and  
4 Harlow that we just saw, as well as by Dr. Wakeham,  
5 that this kind of animal research was crucial to  
6 finding out exactly why the existing products were  
7 dangerous and developing new products that would be  
8 more safe, and that to do that in the most effective  
9 and successful competitive manner the companies  
10 needed to do it in-house. And so an agreement not to  
11 do that inhibited or hobbled the process of creative  
12 destruction.

13 The second thing that it did was it -- again as  
14 articulated by Ms. Brown in her memo, it prevented  
15 the substantiation of the so-called causation  
16 hypothesis by experiments from the companies' own  
17 labs, and it's clear that the companies were very  
18 concerned that since they were taking this line that  
19 causation had not been proven, it was important that  
20 there not be any scientific experiments done that  
21 could be directly attributed to a tobacco company  
22 that might have the effect of confirming the causal  
23 connection between smoking and disease.

24 And then the third effect of the agreement not  
25 to engage in research of this form was that it

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1 allowed the companies to avoid what could have been

2 very large research expenditures. If they had done  
3 this right and each of these companies had  
4 aggressively pursued the kinds of programs that their  
5 scientists were saying were the appropriate  
6 competitive response to the situation, the market  
7 situation that they faced, it would have been a very  
8 expensive undertaking, and that expensive undertaking  
9 might have succeeded for one or more of them, but  
10 might well or most probably would not have succeeded  
11 for all of them, and so that at least some of the  
12 companies would have expended large quantities of  
13 money with no commercial benefit from it.

14 So all three of those aspects resulted from the  
15 successful attempt to prevent each other from  
16 engaging in in-house animal research relating to  
17 smoking and health.

18 Q. And Professor Jaffe, on a year-by-year basis,  
19 these large expenditures would have come at the  
20 expense of what group?

21 A. Well in the short run they would have come at  
22 the expense of the stockholders of the company as the  
23 money was spent on research, and there would have  
24 been no immediate benefit or return from that  
25 investment.

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1 Q. Professor Jaffe, are you now ready to discuss  
2 the second prong of the broader conspiracy dealing  
3 with the reassurance of smokers and the suppression  
4 of unfavorable research?

5 A. Yes.

6 Q. Would you turn to Exhibit 14145, please.

7 A. I have it.

8 Q. Let's do a little rearranging here for a moment,  
9 Your Honor. I'm blocking your view now, aren't I?  
10 Perhaps I could just stand over here a minute or two  
11 for Your Honor, then I'll move it out of the way.

12 THE COURT: I do want counsel to be able to  
13 view this, too.

14 MR. BLEAKLEY: Actually, it was better now  
15 than it was, Your Honor.

16 BY MR. GILL:

17 Q. You're familiar, of course, Professor Jaffe,  
18 with the Frank Statement.

19 A. Yes.

20 Q. All right. Now you've viewed the Frank  
21 Statement from a somewhat different perspective, for  
22 instance, than some of the other witnesses; correct?

23 A. Yes, I think that's right.

24 Q. All right. Now with respect to --

25 Does the Frank Statement essentially contain a

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1 mission statement on behalf of the TIRC?

2 A. Yes, I think it does.

3 Q. All right. And the mission statement is set  
4 forth in -- on the right-hand column next to the  
5 numbers one, two and three?

6 A. Yes.

7 Q. And the first one deals with pledging aid and  
8 assistance to the research effort into all phases of  
9 tobacco use and health, and it mentions that this  
10 joint financial aid will, of course, be in addition  
11 to what is already being contributed by individual  
12 companies.

13 A. Yes.

14 Q. Do you see any problem with that from the  
15 standpoint of competitive behavior?

16 A. No.

17 Q. The second portion of the mission statement  
18 indicates "For this purpose we are establishing a  
19 joint industry group consisting initially of the  
20 undersigned. The group will be known as TOBACCO  
21 INDUSTRY RESEARCH COMMITTEE." So we just have an  
22 identification that's being made there.

23 A. Right.

24 Q. The third element of the mission statement  
25 states, "In charge of the research activities of the

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1 Committee will be a scientist of unimpeachable  
2 integrity and national repute. In addition there  
3 will be an Advisory Board of scientists disinterested  
4 in the cigarette industry. A group of distinguished  
5 men from medicine, science, and education will be  
6 invited to serve on this Board. These scientists  
7 will advise the Committee on its research  
8 activities."

9 Do you have any quarrel from the standpoint of  
10 competitive behavior with any aspect of the mission  
11 statement as publicly announced in several hundred  
12 newspapers in early January 1954 through the  
13 publication of the Frank Statement?

14 A. No. In fact I think if the TIRC and its  
15 successor had done what is stated here they're going  
16 to do, that would have been a pro-competitive  
17 activity, because what they would have done is they  
18 would have developed general information about the  
19 connection between smoking and health which would  
20 have spurred the process of creative destruction,  
21 both by increasing the demand on the part of  
22 customers for safer products, and also by providing  
23 general scientific background that the individual  
24 companies then could have used in their individual  
25 competitive efforts to develop safer products.

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1 Q. Now I take it at the time that the committee was  
2 formed, there were, broadly speaking, two possible  
3 directions that the research might take one.

4 A. Yes, I think so.

5 Q. One might tend --

6 One direction might tend to show, perhaps, that  
7 smoking wasn't a cause of serious health problems.

8 A. That's true.

9 Q. That would tend to have been good for everyone  
10 involved; true?

11 A. Yes. Yes, I think so.

12 Q. Good for the companies.  
13 A. Certainly.  
14 Q. Certainly good for the smokers.  
15 A. Yes.  
16 Q. And probably good for the TIRC, if they  
17 sponsored research that validly established such a  
18 principle.  
19 A. Yes, I would think so.  
20 Q. The other broad direction that the research  
21 might take could be to show a causal link between  
22 smoking and disease.  
23 A. That's correct.  
24 Q. And that wouldn't be good for anyone involved;  
25 would it?

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1 A. I guess that's right.  
2 Q. It certainly wouldn't be good for the smokers if  
3 that were true.  
4 A. That's right.  
5 Q. And certainly in the short-term it wouldn't be  
6 good for the companies that made the cigarettes.  
7 A. That's correct.  
8 Q. But how might such research establishing a  
9 causal link have fostered the process of creative  
10 destruction?  
11 A. Well I think what it would have done is it would  
12 have increased the demand for different products and  
13 therefore increase the motivation and incentive to  
14 compete, and it also would have provided technical  
15 scientific information which the companies then could  
16 have picked up and taken and used in their  
17 competitive efforts to develop safer products.  
18 Q. Do you believe it was important that the  
19 scientific director of this organization be a person  
20 of unimpeachable integrity?  
21 A. Well I think, given what the committee set out  
22 to do and the fact that there was potentially a  
23 conflict of interest in an organization that was  
24 funded by the tobacco industry but which said it was  
25 committed to an objective search for truth, I think

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1 it was very important to have a scientific director  
2 of unimpeachable integrity.  
3 Q. Would the conflict of interest arise if the  
4 research funded by the committee proved reliably that  
5 smoking did not cause disease?  
6 MR. BLEAKLEY: Your Honor, I would object  
7 to the leading nature of these questions. Mr. Gill  
8 is testifying again and again and again.  
9 THE COURT: Okay. It is leading.  
10 Q. Under what different circumstances would  
11 conflict of interest come into play?  
12 A. Well the conflict of interest that I referred to  
13 was the fact that the tobacco companies, as I had  
14 said previously, obviously would be financially  
15 injured by the demonstration that smoking did in fact  
16 cause disease, and so that would be something they

17 would prefer not to happen. They set up this  
18 organization, they clearly were aware of that  
19 potential for conflict of interest, and wanted to  
20 create an impression that they were setting up an  
21 organization that was independent and that would  
22 pursue the truth, notwithstanding the financial  
23 consequences for the companies that were funding it,  
24 and the selection of the scientific director was part  
25 of that effort to appear to deal with that potential

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1 conflict of interest.

2 Q. Now in discussing the Hill & Knowlton memoranda  
3 yesterday, based upon your interpretation of those  
4 memoranda, did the Hill Knowlton memoranda also  
5 contain a mission statement for TIRC?

6 A. Well the Hill Knowlton memoranda did contain a  
7 description of, I believe, a credo, which, as we  
8 talked about yesterday, was very similar to what's  
9 laid out here. The Hill Knowlton memoranda also  
10 discussed the fact that this organization was going  
11 to serve an important public relations function,  
12 which is not particularly -- not the impression you  
13 would get from reading the Frank Statement.

14 Q. Now have you come to an opinion that the CTR  
15 ultimately played a role in the effort to reassure  
16 smokers and to suppress unfavorable research?

17 A. Yes.

18 Q. In the course of --

19 MR. BLEAKLEY: Objection, leading again,  
20 Your Honor.

21 THE COURT: I'll let the answer stand.

22 Q. In the course, Professor Jaffe, of your analysis  
23 of this prong of the broader conspiracy, did you make  
24 an effort to determine whether or not CTR adhered to  
25 the mission statement contained in the Frank

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1 Statement?

2 A. Yes, I did.

3 Q. And were you particularly interested in  
4 attempting to determine whether or not the scientific  
5 director of the TIRC exhibited unimpeachable  
6 integrity in carrying out his duties?

7 A. Yes.

8 MR. BLEAKLEY: Your Honor, may we have a  
9 side-bar?

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1 (Side-bar discussion as follows:)

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(Side-bar discussion concluded.)

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1 THE COURT: Let's take a short recess.  
2 THE CLERK: Court stands in recess.  
3 (Recess taken.)  
4 THE CLERK: All rise. Court is again in  
5 session.  
6 (Jury enters the courtroom.)  
7 THE CLERK: Please be seated.  
8 THE COURT: Counsel.  
9 MR. GILL: Thank you, Your Honor.  
10 BY MR. GILL:  
11 Q. Professor Jaffe, will you turn to Exhibit 10493.  
12 A. I have it.  
13 Q. This is a letter on the letterhead of the  
14 Tobacco Industry Research Committee dated August 26,  
15 1958, and it's addressed to Mr. T. V. Hartnett,  
16 chairman, at his office on 42nd Street in New York  
17 City.  
18 Who was Mr. Hartnett?  
19 A. Well in addition to being chairman at this time  
20 of the TIRC, he was the chairman of Brown &  
21 Williamson and one of the signers of the Frank  
22 Statement on behalf of Brown & Williamson.  
23 Q. So back in 1954 Mr. Hartnett had signed the  
24 Frank Statement on behalf of Brown & Williamson as  
25 its president?

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1 A. That's correct.  
2 Q. And now four and a half years later he's the  
3 chairman of the committee that's going to be funding  
4 scientific research into all phases of tobacco use  
5 and health.  
6 A. That's correct.  
7 Q. And this letter is authored by whom?  
8 A. It's authored by a Dr. Little, the first  
9 scientific director of the TIRC.  
10 Q. And that's shown on page three.  
11 A. Correct.  
12 Q. So Dr. Little, the scientific director, is

13 writing a letter to the chairman of the TIRC.  
14 A. Yes.  
15 Q. Now what is Dr. Little discussing in the first  
16 paragraph of his letter to Mr. Hartnett?  
17 A. Well he says, "As Scientific Director of the  
18 Tobacco Industry Research Committee it is my duty to  
19 warn the members of that body of the serious and  
20 dangerous effects on its research program if the  
21 present trend continues toward the emphasis on 'tar  
22 reduction' in advertising of cigarettes."  
23 Q. Do you find anything in the mission statement of  
24 the TIRC with respect to warning the tobacco industry  
25 of anything?

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1 A. No. The TI -- the --  
2 The Frank Statement describes the mission of the  
3 TIRC and its independent scientific director as  
4 someone whose job is going to be to find out the  
5 truth about smoking and health and to communicate  
6 that information to smokers.  
7 Q. Dr. Little goes on to give reasons for his  
8 warning; does he not?  
9 A. Yes.  
10 Q. If you direct your attention to reason number  
11 three at the bottom of page one.  
12 A. Yes. It says, "Representatives of the American  
13 Cancer Society and other believers in the, quote,  
14 tobacco-guilt, unquote, theory are already asking the  
15 question as to why the vast financial resources of  
16 the tobacco industry are not being used to promote  
17 research in the removal of the, quote, guilty,  
18 unquote, substances from smoke."  
19 Q. Now if the process of creative direction were  
20 fully underway at this point in 1958 with respect to  
21 the threat to the industry that occurred in late  
22 1953, would you have expected the industry to  
23 pursuing -- to be pursuing the very things that Dr.  
24 Little is directing the industry's attention to in  
25 that particular paragraph?

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1 A. Yes, I would. I would be expecting them to --  
2 to try to find -- use their financial resources to  
3 identify the guilty substances, so to speak, and to  
4 remove them.  
5 Q. All right. Let's look at some of the other  
6 reasons for Dr. Little's concern as set forth on the  
7 second page. If you'd direct your attention to  
8 reason number six.  
9 A. Yes. It says, "The Scientific Advisory Board  
10 has consistently refused to accept the hypothesis of,  
11 quote, tar, unquote, guilt for lack of substantiating  
12 evidence and has insisted that basic research of  
13 various types must precede satisfactory understanding  
14 of the relation of tobacco to human health."  
15 Q. And what is your understanding from a review of  
16 the documents, Professor Jaffe, of the term "basic  
17 research?"

18 A. Well I think what he means here by basic  
19 research is research that would not focus directly on  
20 looking at smoking and health, but instead would be  
21 focused on more general research that would attempt  
22 to determine biological factors related to the  
23 diseases that have been considered.

24 Q. And Dr. Little is using the past tense at this  
25 point in August of 1958 with respect to the focus of

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1 the TIRC's research program being directed toward  
2 basic research?

3 A. Yes.

4 Q. Is that consistent with the mission statement to  
5 engage in research into all phases of tobacco use and  
6 health?

7 MR. BLEAKLEY: Your Honor, this was the  
8 objection I raised during the side-bar.

9 THE COURT: No, you may answer that.

10 A. Well I think that if they were going to do what  
11 the Frank Statement said they were going to do, then  
12 they would be trying to understand all aspects of the  
13 connections between smoking and health. And as we'll  
14 see later on, some of the documents discuss

15 specifically the fact that they're going to use the  
16 need for more basic research, essentially, as the  
17 smoke screen to cover up or to divert attention from  
18 research that directly connects smoking and health.

19 MR. BLEAKLEY: Your Honor, I move to strike  
20 that answer both as non-responsive and outside the  
21 competence of this witness's expertise.

22 THE COURT: It is non-responsive.

23 MR. GILL: We'll get to that other document  
24 in a little while, Professor Jaffe.

25 THE WITNESS: Okay.

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1 MR. GILL: If you direct --

2 MR. BLEAKLEY: I move -- I would ask the  
3 court to direct Mr. Gill not to make commentary and  
4 just ask questions.

5 THE COURT: Just direct questions to the  
6 witness, please.

7 MR. GILL: I apologize, Your Honor.

8 BY MR. GILL:

9 Q. Professor Jaffe, if you direct your attention to  
10 paragraph seven, what is being discussed there?

11 A. It says, "Should increased or insistent outside  
12 demand occur for the concentration or limitation of  
13 the S.A.B. planned research to the field of  
14 identifying and/or removing suspected components from  
15 tobacco smoke, extremely unfortunate and possibly  
16 destructive influences on the TIRC program may well  
17 develop."

18 Q. Why would such influences have been destructive  
19 on the program of TIRC?

20 A. Well I read this -- this section to be saying  
21 that Dr. Little wants to preserve the course of the  
22 TIRC in terms of basic research and is concerned that

23 the competitive behavior of the companies, which is  
24 described at the beginning of the letter, is going to  
25 create increased demands for a different kind of

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1 research; that is, research that would focus more  
2 directly on the connection between smoking and  
3 health, in particular, smoke constituents.

4 Q. Does the next paragraph of the letter also shed  
5 light on Dr. Little's attitude toward his duties?

6 A. Yes.

7 Q. How so?

8 A. Well he says, "Although this serious danger  
9 exists, I believe that it can and should be  
10 eliminated by prompt and unanimous action by the  
11 industry. This, I believe, should take the form of a  
12 simple statement or statements by the public" -- I'm  
13 sorry, "statements to the public by press, radio and  
14 television to the effect that," and then he goes on  
15 to list several things that companies should all  
16 unanimously say, which is that the increase in  
17 manufacturing of filter cigarettes is in response to  
18 public demand and to nothing else, that the industry  
19 does not admit adverse health effects of smoke  
20 constituents or nicotine contained in its products  
21 previously or now sold, with or without filters, and  
22 that the industry will continue to support research  
23 that will help to answer the many questions asked  
24 concerning the possible relationship of tobacco to  
25 human health and well-being.

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1 Q. Let me stop you right there, professor.

2 Do you find anything significant about the  
3 attitude expressed by Dr. Little in this letter to  
4 Mr. Hartnett?

5 MR. BLEAKLEY: Your Honor, I object. The  
6 question is too broad, it's leading. It should be  
7 limited to this witness's expertise.

8 THE COURT: Okay. Rephrase the question.

9 MR. GILL: Yes, Your Honor.

10 BY MR. GILL:

11 Q. In connection with the analysis that you have  
12 performed, Professor Jaffe, in connection with your  
13 review of the internal documents of the industry, and  
14 further in connection with your entire background and  
15 experience in the area of antitrust economics, did  
16 you find any significance in the statements expressed  
17 by Dr. Little in this letter with respect to the  
18 opinions you've reached in this case?

19 A. Yes. What this letter is doing is the  
20 scientific director of the CTR is writing to the  
21 chairman, who also happens to be the president of one  
22 of the tobacco companies, and urging him and his  
23 competitors to cease to engage in competitive  
24 activities that are increasing smokers' concerns  
25 about the constituents of tobacco smoke, mainly the

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1 tar, and instead, to reform the unanimous and united  
2 position that the Hill & Knowlton document talked  
3 about them agreeing to four years earlier, and in so  
4 doing, to make sure that they, in effect, maintained  
5 this unified position, that they don't communicate by  
6 their actions that they believe that cigarettes are  
7 harmful, and that's not what the Frank Statement said  
8 the scientific director's responsibilities were going  
9 to be. The scientific director's responsibilities  
10 were going to be to be independent of the tobacco  
11 companies and to seek out the truth, and what we see  
12 is that, instead, he's playing an active role in  
13 essentially maintaining the reassurance of smokers  
14 and trying to help avoid actions by the companies  
15 that would do the opposite.

16 Q. Let's look for a moment, professor, at the  
17 specific suggestions offered by Dr. Little to the  
18 tobacco industry.

19 In connection with the first suggestion, the  
20 increase in manufacture of filtered cigarettes is a  
21 response to public demand and to nothing else, based  
22 upon your review of the industry's internal  
23 documents, did the industry conform to Dr. Little's  
24 suggestion?

25 A. Yes, I think they did.

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1 Q. How about with respect to the second suggestion,  
2 that the industry does not admit adverse health  
3 effects of smoke constituents or nicotine as  
4 contained in its products previously or now sold,  
5 with or without filters, did the industry conform to  
6 that suggestion?

7 A. Yes, they did.

8 Q. And with respect to the third suggestion, what  
9 action did the industry take in response to the  
10 suggestion that it continue to support research that  
11 will help to answer the many questions concerning the  
12 possible relation of tobacco to human health and  
13 well-being?

14 A. That's what they did.

15 Q. They continued to support the attempt to find  
16 the answer to those questions.

17 A. Yes.

18 Q. Was there a fourth suggestion on the next page?

19 A. Yes. The last suggestion at the top of the next  
20 page.

21 Q. Okay. What is Dr. Little discussing in that  
22 suggestion?

23 A. Here he says that the -- the companies should  
24 also unanimously say that the industry will at the  
25 same time try to meet the wishes of the public by

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1 providing tobacco for smoking in the form most  
2 conducive to maintaining and increasing the  
3 pleasurable, satisfying, and emotionally balancing

4 effects of this very old and almost universal custom.  
5 Q. Based on your analysis, Dr. Jaffe, how does that  
6 suggestion relate to Dr. Little's job description as  
7 set forth in the Frank Statement?

8 MR. BLEAKLEY: Objection. This goes beyond  
9 this witness's competence, calls for speculation.

10 THE COURT: No, you may answer that.

11 A. I think it is completely inconsistent with what  
12 the Frank Statement said he was going to be doing.

13 Q. Did you find other documents in the 1958  
14 timeframe that presented some insights into the  
15 attitude of Dr. Little and the staff at TIRC?

16 A. Yes.

17 MR. BLEAKLEY: Objection, Your Honor, Mr.  
18 Gill is leading again.

19 THE COURT: Sustained.

20 Q. Would you turn, Professor Jaffe, to Exhibit  
21 11028. Now this is an exhibit that the jury has seen  
22 many times, Professor Jaffe. We won't spend a  
23 large -- long period of time on it. But you are  
24 familiar with the nature of this exhibit?

25 A. Yes.

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1 Q. And you understand that it's a report by three  
2 scientists from BATCo-related companies with respect  
3 to a trip to the United States in the spring of 1958  
4 and it provides information regarding various  
5 interviews that occurred.

6 A. That's correct.

7 Q. All right. And you know that one of the -- or  
8 several of the interviews concerned members of  
9 management of TIRC, including an interview with Dr.  
10 Little on May 8th of 1958.

11 A. Yes, it indicates that on the next page.

12 Q. All right. Would you --

13 Would you turn, then, to page two of the  
14 memorandum, next page of the memorandum. And dealing  
15 down below, in the bottom half of the page, with  
16 causation of lung cancer, you're familiar with the  
17 statement, "With one exception (H.S.N. Greene) the  
18 individuals whom we met believed that smoking causes  
19 lung cancer if by 'causation' we mean any chain of  
20 events that leads finally to lung cancer and which  
21 involves smoking as an indispensable link," now --

22 A. Yes.

23 Q. -- that statement would presumably include which  
24 members of the TIRC?

25 A. Well it indicates on the previous page that they

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1 did meet with Dr. Little, the scientific director, as  
2 well as Mr. Hoyt, who was on the staff of the C --  
3 the TIRC.

4 Q. Now how would you compare the attitude expressed  
5 in this paragraph attributed to Dr. Little and Dr.  
6 Hoyt with the attitude expressed by Dr. Little in his  
7 letter to Mr. Hartnett a few months later with  
8 respect to the causation issue?

9 MR. BLEAKLEY: Objection, again leading, it  
10 again asks for the witness to speculate.

11 THE COURT: Well you may answer that.

12 A. Well as we saw in the letter to Dr. Hartnett,  
13 what Dr. Little is saying there is that we -- we --  
14 we want to keep doing research because we don't yet  
15 know whether smoking causes cancer, and we want to  
16 do -- we're not -- we want to make sure the companies  
17 don't take any action that would reinforce smokers'  
18 belief in the causation hypothesis, which according  
19 to this document he himself had already accepted.

20 Q. If you turn to page five of this exhibit,  
21 Professor Jaffe, do you see there's a section of the  
22 memorandum dealing with "ATTITUDE OF U.S. INDUSTRY TO  
23 BIOLOGICAL TESTING?"

24 A. Yes.

25 Q. And it quotes some information that the authors  
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1 apparently received from representatives of Liggett &  
2 Myers.

3 A. Yes.

4 Q. In fact, the Liggett & Myers representatives are  
5 actually Drs. Darkis and Pates; correct?

6 A. Yes, according to the memo.

7 Q. All right. And Liggett & Myers representatives  
8 go on to express the opinion in the fourth line that  
9 "...TIRC has done little if anything constructive,  
10 the constantly reiterated, quote, not proven,  
11 unquote, statements in the face of mounting contrary  
12 evidence has thoroughly discredited TIRC, and the SAB  
13 of TIRC is supporting almost without exception  
14 projects which are not related directly to smoking  
15 and lung cancer."

16 To your understanding, what type of projects are  
17 the Liggett & Myers representatives referencing in  
18 that sentence?

19 A. Well what they're saying is very consistent with  
20 what Dr. Little said in the letter to the chairman,  
21 that what they're going to do is, instead of doing  
22 research that would be directly related to smoking  
23 and health, that they're going to engage in more  
24 basic research along -- along the lines of the  
25 argument that that was what was -- all that was

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1 called for.

2 Q. And how does the assessment of the constantly  
3 reiterated, quote, not proven, unquote, statements  
4 jibe with the advice that Dr. Little was giving to  
5 the industry in his letter a few months later?

6 A. Well it is precisely the line that he was urging  
7 the companies to stick to in his letter that we  
8 looked at.

9 Q. In your review of the companies' internal  
10 documents, did you also attempt to analyze and  
11 investigate the attitude of staff members of TIRC  
12 with respect to their duties?

13 A. Yes.



14 Q. Would you turn to Exhibit 11922. This is one of  
15 the documents that you relied upon in support of your  
16 opinions --

17 A. Yes.

18 Q. -- in this case?

19 MR. GILL: Your Honor, we'll offer Exhibit  
20 11922.

21 MR. BLEAKLEY: No objection.

22 THE COURT: Court will receive 11922.

23 BY MR. GILL:

24 Q. This is an internal TIRC memorandum to Dr. C. C.  
25 Little from J. K. Brady. Perhaps I misread the

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1 middle initial, but J. Brady. Who was J. Brady?

2 A. I think he was the assistant or associate  
3 director of the TIRC. I don't remember the exact  
4 title.

5 Q. Associate scientific director?

6 A. Right.

7 Q. So this would be a member of the CRT's  
8 management staff reporting to his superior.

9 A. To his superior, the scientific director, Dr.  
10 Little.

11 Q. Now does Dr. Brady in the very first paragraph  
12 indicate his tenure with the -- with the TIRC?

13 A. Yes, he says he's been there for two years.

14 Q. And what is the purpose of his communication to  
15 Dr. Little as expressed in that paragraph?

16 A. What he says is the purpose of the memo is to  
17 clarify his feelings about the program and convey  
18 some thoughts about it to Dr. Little.

19 Q. And does he convey some thoughts in the last  
20 full paragraph on that page?

21 A. Yes, he does.

22 Q. All right.

23 A. He says in the last full paragraph on that page,  
24 "To date, the TIRC program has carried its fair share  
25 of the public relations load in providing materials

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1 to stamp out the brush fires as they arose. While  
2 effective in the past, this whole approach requires  
3 both revision and expansion. The public relations  
4 problem created by Hammond et al. was like the early  
5 symptoms of diabetes - certain dietary controls kept  
6 public opinion reasonably healthy. When some new  
7 symptom appeared, a shot of insulin in the way of a  
8 news release, a Berkson antidote, a Rosenblatt  
9 television rebuttal, et cetera, kept the patient  
10 going. Again characteristic of the same disease with  
11 age, the problem becomes more complex, response to  
12 treatment is slower and treatment far more complex.  
13 Troublesome symptoms are appearing in the almost  
14 constant reference to cigarette smoking or the use of  
15 tobacco in some form in practically every article  
16 written about disease (all forms of lung disease as  
17 well as cardiovascular disease), tumor formation of  
18 the upper respiratory tract, gastrointestinal

19 disorders, e.g., ulcer, et cetera."  
20 Q. Let me interrupt you there, Professor Jaffe. Is  
21 the assessment of the TIRC program provided by Dr.  
22 Brady in this written memorandum to his superior, Dr.  
23 Little, consistent with the mission statement of the  
24 TIRC?  
25 A. No. This is not consistent with what the Frank  
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1 Statement said the TIRC was going to be; rather, it  
2 seems to be consistent with the Hill & Knowlton  
3 description of the broader strategy which included  
4 the formation of this committee as essentially a  
5 public relations endeavor by the industry.  
6 Q. Did you find in your review of the documents  
7 provided to you any response by Dr. Little to this  
8 memorandum?  
9 A. No, I did not.  
10 Q. Now were you also interested in reviewing the  
11 CTR annual reports that that organization issued on  
12 an annual basis?  
13 A. Yes.  
14 Q. All right. Let's look at Exhibit 17873. Is  
15 this one of the documents that you've relied upon in  
16 support of your opinions?  
17 A. Yes.  
18 Q. And is this particular CTR annual report  
19 representative of the other annual reports that you  
20 reviewed between the timeframe of the mid-'50s to the  
21 late '70s?  
22 A. That's correct.  
23 MR. GILL: We'll offer, Your Honor, Exhibit  
24 17873.  
25 MR. BLEAKLEY: No objection.  
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1 THE COURT: Court will receive 17873.  
2 MR. GILL: Your Honor, just for the sake of  
3 clarity for the record, I would point out that this  
4 particular exhibit has already been introduced in the  
5 case by defendants as MD000027, but we've used this  
6 other copy because we found it very difficult to read  
7 the exhibit that was introduced.  
8 THE COURT: All right. The record will  
9 show that.  
10 BY MR. GILL:  
11 Q. Professor Jaffe, what we're looking at now is  
12 the second page, it says "ANNUAL REPORT of the  
13 SCIENTIFIC DIRECTOR, CLARENCE COOK LITTLE."  
14 A. That's correct.  
15 Q. And if we went back to the first page, would we  
16 see that this is an annual report for the period  
17 1963-1964?  
18 A. Yes.  
19 Q. It's difficult to read --  
20 A. If you had very good eyes, you could see that it  
21 says '63 to '64.  
22 Q. All right. And if you would go to page five of  
23 the annual report --

24 This annual report contains over 50 pages; does  
25 it not?

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1 A. Yes.  
2 Q. And it's essentially a summary of the activities  
3 of the CTR over the 12-month period consisting of the  
4 last half of '63 and the first half of '64?  
5 A. That's correct.  
6 Q. And at page five there are some introductory  
7 remarks with respect to the nature of the report?  
8 A. Yes. They're called observations.  
9 Q. All right. What's being discussed there?  
10 A. Well it gives a general overview and it  
11 indicates at the very beginning that a decade has  
12 passed since the TIRC, which has now had its name  
13 changed to the CTR, began its work.  
14 Q. And in the third paragraph, what's being  
15 discussed there?  
16 A. It says, "Significant advances have occurred in  
17 scientific knowledge and understanding. It now seems  
18 appropriate to review the progress and the problems  
19 of this first decade, and to consider their  
20 implications for the future."  
21 Q. And does the next paragraph provide some  
22 perspective?  
23 A. Yes. It says, "Perhaps the most significant  
24 aspect of such a review is the realization that the  
25 passage of a substantial period of time -- and the

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1 accomplishment of a substantial body of work -- have  
2 not changed the fundamental problems. As is often  
3 the case in basic scientific exploration, intensive  
4 research has raised more new questions than it has  
5 answered; the task before us is, if anything, larger  
6 and more complex than it appeared a decade ago, and  
7 the major research problems underlying the  
8 relationships of smoking to health, although somewhat  
9 better defined, remain formidable."  
10 Q. What's the essential thread of that paragraph?  
11 A. Well the essential thread of that paragraph is  
12 the same line that we have seen now in several  
13 places, which is we don't know what the connection  
14 between smoking and health is, we need to do more  
15 research, particularly basic research, and until we  
16 do that we won't be able to say anything about the  
17 problems.  
18 Q. Would you direct your attention to page 48 of  
19 this exhibit, please.  
20 A. Yes, I have it.  
21 Q. Now we're in a portion of the exhibit in which  
22 the CTR is setting forth abstracts of all of the  
23 research funded by CTR that happened to be published  
24 during the 12-month period in time in question. Is  
25 that correct, professor?

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- 1 A. Yes, that's -- that's what the report says, yes.  
2 Q. And this is a section of the report that started  
3 back at page 30 or so and then proceeds to cover  
4 about 40 pages' worth of the report.  
5 A. That's right. There are many, many abstracts of  
6 different studies in this section of the report.  
7 Q. And the abstracts are broken down into various  
8 categories?  
9 A. That's correct.  
10 Q. And this is a category that deals with  
11 psychophysiological studies.  
12 A. That's correct.  
13 Q. And there are two abstracts that are reported  
14 under that category at pages 48 and 49; is that  
15 correct?  
16 A. That is correct.  
17 Q. And what we're looking at now on the screen is  
18 the first of those two studies.  
19 A. Yes.  
20 Q. And what type of a study is this one, the first  
21 one?  
22 A. Well this first one, the title of it is "TASTE  
23 THRESHOLDS, CIGARETTE SMOKING, AND FOOD DISLIKES."  
24 Q. And then it lists the authors.  
25 A. Right.

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- 1 Q. These authors were funded by CTR and they had  
2 their study published in a -- in a journal.  
3 A. That's correct.  
4 Q. And if we go to the very last sentence of this  
5 abstract, does that indicate a summary of what this  
6 particular study involved?  
7 A. Yes. It says, "Apparently, food and cigarette  
8 aversions are analogously related to taste thresholds  
9 for the four 'classical' taste qualities."  
10 Q. Based upon your review of the information  
11 contained in this abstract, does this study appear to  
12 fit into the process of creative destruction?  
13 A. Not really. I mean I -- it's hard to tell what  
14 it's exactly about. It seems to be something about  
15 how people's tastes for cigarettes and foods are  
16 related.  
17 Q. Let's look at the second, then, of the two  
18 abstracts under this category of psychophysiological  
19 study. What's the title of this study?  
20 A. It's called "ADDICTIVE ASPECTS IN HEAVY  
21 CIGARETTE SMOKING."  
22 Q. And based upon your review of this abstract,  
23 does this particular study appear to have any  
24 relationship to the process of creative destruction  
25 or potential creative destruction?

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- 1 A. Yes, I think this is the kind of study that the  
2 Frank Statement suggested that CTR would be doing,  
3 because it's looking at the question of addiction,  
4 which is an attribute or a characteristic of

5 cigarettes that relates to health, and that smokers  
6 would want to know about.  
7 Q. And once again we see the -- the researchers who  
8 authored this study?  
9 A. Yes.  
10 Q. We see an indication that it was published in  
11 the American Journal of Psychiatry --  
12 A. That's correct.  
13 Q. -- in April of 1963.  
14 A. Yes.  
15 Q. And what of significance does the abstract show  
16 with respect to the findings and conclusions of these  
17 authors?  
18 A. Well at the very beginning it indicates that 15  
19 heavy smokers were observed in a state of sudden  
20 abstinence from cigarettes and were contrasted with a  
21 comparable group of eleven subjects allowed to smoke  
22 as much as they wanted. So this was an experiment  
23 where, essentially, they took heavy smokers and made  
24 them stop smoking.  
25 Q. And then starting at the very bottom of that

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1 page with the -- with the last paragraph that appears  
2 on the page, are there some findings reported?  
3 A. Yes. It says, "Cardiac slowing, presumably  
4 vagotonic, and a lowering of diastolic blood pressure  
5 occurred in the withdrawal group. Other less  
6 clear-cut complaints of distress, such as 'emptiness'  
7 and slow passage of time, seemed related to the state  
8 of abstinence."

9 And then if you skip down to the next paragraph,  
10 it says, "Heavy smokers thus appear to exhibit some  
11 addictive features, showing not only social  
12 habituation but mild physiological withdrawal  
13 effects."

14 Q. Now did you review the deposition of Robert  
15 Heimann?

16 A. Yes, I did.

17 Q. Do you recall in that deposition that he was  
18 asked questions by the attorney for the plaintiff in  
19 that case with respect to Mr. Heimann's awareness of  
20 this study?

21 A. Well he was asked, in general, about whether he  
22 was aware of studies funded by CTR that showed that  
23 cigarettes appeared to be addictive.

24 Q. And what did Mr. Heimann say in response?

25 A. He -- he could not recall being -- being aware

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1 of this kind of study funded by CTR.

2 Q. Now having found this particular abstract at  
3 page 48 and 49 of the annual report, what then did  
4 you do?

5 A. Well I looked to see --

6 I went back to the beginning of the report where  
7 the scientific director is summarizing the  
8 significant developments that they have found in  
9 their research to see whether this report was

10 mentioned and what the scientific director in his  
11 report was going to say about the significance of  
12 this study when he is summarizing the significant  
13 research funded by CTR.

14 Q. If you go to page 16, please.

15 A. Okay.

16 Q. Is this the beginning of the section where the  
17 scientific director calls attention to significant  
18 research results achieved over the previous 10 years?

19 A. That's correct.

20 Q. And directing your attention to the fourth  
21 paragraph under that heading, does the scientific  
22 director report in connection with the level of  
23 funding and the number of grants that have been  
24 approved for funding?

25 A. Yes. It lists that and it says, "After a decade

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1 of support of research it seems appropriate to review  
2 some of the scientific findings that have been made."  
3 And then further down at the end of that little  
4 introductory section it says, "Of course, it is  
5 impossible to list all of the achievements of the  
6 Council's research. However, this review will  
7 attempt to cite some significant illustrative  
8 examples."

9 Q. And then does the report break down the  
10 significant illustrative examples in various  
11 categories?

12 A. That's right.

13 Q. And is one of the categories psychosocio-  
14 logical -- psychophysiological studies?

15 A. Yes, that's correct.

16 Q. All right. Is that contained on page 26?

17 A. Yes.

18 Q. Let's go there, please.

19 Now are we now looking on the screen at the  
20 entire section of the report devoted to the  
21 significant studies relating to psychophysiological  
22 studies?

23 A. Yes. Dr. Little chose to mention -- (clearing  
24 throat) excuse me -- only two studies in this  
25 section, and they're indicated on the screen.

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1 Q. And what is the nature of the discussion that  
2 appears at this portion of the report relative to  
3 those studies?

4 A. Well both of these are studies that look at  
5 characteristics of people who smoke and basically  
6 find that smokers are different from other people in  
7 various respects, which is the kind of information  
8 that the industry used to put forward the so-called  
9 constitutional hypothesis, which tried to explain the  
10 epidemiological evidence linking smoking to cancer on  
11 the basis of the possibility that smoking didn't  
12 cause cancer, it was just that people who smoked were  
13 different from people who didn't smoke, and -- and in  
14 some ways it might be related to the possibility of

15 their getting cancer.  
16 Q. So you found no mention of the study with  
17 respect to addictive aspects in heavy cigarette  
18 smoking in this section of the report.  
19 A. That's correct.  
20 Q. Did you check to see if you might find the study  
21 on addiction mentioned in some other category?  
22 A. Yes. I thought, because of the nature of the  
23 abstract, that it might have been included in the  
24 section on cardiac studies.  
25 Q. All right. And is that on page 20, bottom of  
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1 the page?  
2 A. Yes, cardiovascular research.  
3 Q. And that section goes on to page 21 as well;  
4 does it not?  
5 A. Yes. And page 22, there are a total of 13  
6 different studies that are summarized in the section  
7 on cardiovascular -- (clearing throat) excuse me --  
8 research.  
9 Q. Let me direct your attention to item number four  
10 on cardiovascular research on page 21. What is Dr.  
11 Little reporting there?  
12 A. He's describing studies with a new instrument,  
13 called a vibrocardiograph, have shown that the  
14 overall effect of nicotine is closely analogous to  
15 that of mild exercise.  
16 Q. Is Dr. Little's treatment of that study similar  
17 or dissimilar to the fourth suggestion he gave to the  
18 tobacco industry with respect to its treatment of  
19 smoking?  
20 A. Well his identification of this study as one of  
21 the significant findings of the CTR in the first 10  
22 years would seem to be quite consistent with his  
23 suggestion to the overall tobacco industry that they  
24 should try to emphasize the desirable aspects of  
25 smoking.

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1 MR. BLEAKLEY: Your Honor, I move to strike  
2 that answer, and I move -- object to these questions.  
3 This is the subject matter we discussed at side-bar,  
4 I believe that the witness is going far beyond his  
5 qualifications as an antitrust economist and is now  
6 giving the jury his own interpretation, which  
7 includes medical and scientific, and it shouldn't be  
8 allowed.

9 THE COURT: Okay. That answer will be  
10 stricken. You'll have to rephrase your question,  
11 counsel.

12 BY MR. GILL:

13 Q. What interpretation did you place on the report  
14 that Dr. Little gave regarding this particular study  
15 on the effects of nicotine with respect to Dr.  
16 Little's attitude toward his job responsibilities?

17 MR. BLEAKLEY: Same objection, Your Honor,  
18 and also asking the witness to speculate.

19 THE COURT: You can answer that.

20 A. Well my reason for looking at the CTR annual  
21 reports to begin with was to try to determine whether  
22 the CTR and Dr. Little as scientific director of CTR  
23 were doing what the Frank Statement said the CTR was  
24 going to do, which was to try to objectively look at  
25 the issue of smoking and health and to convey to

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1 smokers what they found. And what's significant to  
2 me is that what he finds to be a significant  
3 accomplishment in their first 10 years is a study  
4 that appears to show a benefit of smoking, whereas  
5 the study that they also funded that found that  
6 smoking appeared to be addictive related to nicotine  
7 he did not choose to mention as a scientific -- as a  
8 significant finding.

9 MR. BLEAKLEY: I repeat my objection, move  
10 to strike the answer, both on the grounds that I  
11 previously stated and also it was non-responsive.

12 THE COURT: No, that answer will stand.  
13 BY MR. GILL:

14 Q. Professor Jaffe, are you aware of when the first  
15 Surgeon General's report was issued?

16 A. Yes, it was issued the beginning of 1964.

17 Q. In January of '64?

18 A. That's correct.

19 Q. And the CRT's annual report came out sometime  
20 after June of '64?

21 A. I believe that's correct, yes.

22 Q. How did the CTR annual report treat the issuance  
23 of the Surgeon General's report?

24 A. As far as I can tell, it doesn't -- didn't even  
25 mention that the Surgeon General's report had been

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1 issued or that there were any significant scientific  
2 findings reported by the Surgeon General.

3 Q. Did you continue to investigate the focus of CTR  
4 research through your review of the industry's  
5 internal documents?

6 A. Yes, I did.

7 Q. Would you turn to Exhibit 21804, please. Is  
8 this a document that you have relied upon in support  
9 of your opinions, Professor Jaffe?

10 A. Yes, it is.

11 Q. And it's already been admitted into evidence.

12 It is a January 19, 1968 letter, and it is from  
13 Addison Yeaman, who is listed as the vice-president  
14 and general counsel of the Brown & Williamson Tobacco  
15 Corporation; is that correct?

16 A. That's correct.

17 Q. And it is addressed to Messrs. Grant,--

18 And I'd like you to assume that Mr. Grant was  
19 the general counsel of Lorillard.

20 A. Okay.

21 Q. -- Mr. Haas, who was the general counsel of  
22 Liggett, Mr. Hetsko, who as you know was the general  
23 counsel of American Tobacco, Mr. Ramm, who was the  
24 general counsel of RJR, Mr. Smith, the general



25 counsel of Philip Morris, to Mr. Forsyth with a  
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1 carbon copy to Dr. Little.  
2 A. That's correct.  
3 Q. Now, what is being discussed in this letter?  
4 A. What's being discussed in this letter is the  
5 issue of a possible reorientation of the research  
6 program of the CTR.  
7 Q. And in the first paragraph of the letter there's  
8 an indication that the author, Mr. Yeaman, was joined  
9 by Janet Brown and Cy Hetsko at a luncheon.  
10 A. That's correct.  
11 Q. And they had a discussion with respect to two  
12 principal items.  
13 A. Yes, the idea of increased participation by our  
14 respective R&D directors and/or overall problems  
15 relating to health, and Brown & Williamson's concern,  
16 which the author understood to be shared generally,  
17 in varying degrees, for some reassessment and  
18 possible realignment or reorientation of CTR.  
19 Q. Given the mission statement of CTR as set forth  
20 in the Frank Statement, can you account for a  
21 situation in which the general counsel of the  
22 tobacco-company sponsors of CTR are discussing a  
23 reorganization of that body?

24 MR. BLEAKLEY: Objection, Your Honor.

25 THE COURT: You may answer that.

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1 A. Well as I said when I first talked about the  
2 Frank Statement, there was inherent potential  
3 conflict of interest between the financial interests  
4 of the tobacco company -- companies and their stated  
5 financial -- sorry -- their stated goal with respect  
6 to CTR, which was to find out the truth about smoking  
7 and health. I would think that if they were trying  
8 to avoid that conflict of interest and let CTR do the  
9 job that they said it was going to do, the last  
10 people you'd want deciding what the policy for CTR  
11 would be would be the general counsel of the tobacco  
12 companies.  
13 Q. Do you find any significance to the fact that  
14 Mr. Yeaman let Dr. Little know what Mr. Yeaman and  
15 the other general counsel were discussing in terms of  
16 a reorganization of the CTR?  
17 A. Well it suggests that Dr. Little was certainly  
18 aware of the fact that this was the way things were  
19 going.  
20 Q. What's being discussed in the second  
21 paragraph --

22 MR. BLEAKLEY: Excuse me, Your Honor, can I  
23 have a continuing objection to questions asking the  
24 witness to comment on the involvement of lawyers?

25 THE COURT: I think you better make your

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1 objection, counsel, when you feel it's appropriate.  
2 MR. BLEAKLEY: All right. Then I move to  
3 strike that answer.

4 THE COURT: That answer will stand.  
5 BY MR. GILL:

6 Q. What's being discussed in the second paragraph,  
7 Professor Jaffe?

8 A. It says, "The discussion was highly useful. I  
9 got the impression that Lorillard, like Brown &  
10 Williamson certainly and others of us possibly, has  
11 considerable concern as to whether we are spending  
12 our dollars in the most useful way and specifically  
13 whether we might derive greater value, both short and  
14 long term, from CTR were it re-oriented and perhaps -  
15 in a sense - re-organized."

16 Q. According to the Frank Statement, Professor  
17 Jaffe, who was to benefit from the operation of CTR?

18 A. The smokers.

19 Q. What's being discussed in the third paragraph?

20 A. Well in the third paragraph he then goes in to  
21 talking about this orientation, and he talks about  
22 discussing it with Janet Brown, and he lays out an  
23 argument that he represents Janet Brown as having  
24 articulated at the meeting, and basically the gist of  
25 that argument is that CTR should not be reoriented.

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1 And the two arguments that he lays down from Janet  
2 Brown as to why it should not be reoriented, he says,  
3 "With apologies to Janet if I misstate her position,  
4 the argument seems to be that by operating primarily  
5 in the field of research of the disease we do at  
6 least two useful things:

7 "First, we maintain the position that the  
8 existing evidence of a relationship between the use  
9 of tobacco and health is inadequate to justify  
10 research more closely related to tobacco.

11 "Secondly, that the study of the disease keeps  
12 constantly alive the argument that, until basic  
13 knowledge of the disease itself is further advanced,  
14 it is scientifically inappropriate to devote the  
15 major effort to tobacco."

16 Q. And what type of research is the research of the  
17 disease?

18 A. Essentially basic research looking at  
19 fundamental biological mechanisms rather than  
20 research that would focus on the link between tobacco  
21 and disease.

22 MR. BLEAKLEY: I object to that, Your  
23 Honor, and move to strike it. This witness is not  
24 competent to give that kind of testimony.

25 THE COURT: Sustained.

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1 BY MR. GILL:

2 Q. Professor Jaffe, are the views attributed to Ms.  
3 Brown with respect to the focus of the TIRC's  
4 research consistent or inconsistent with the mission  
5 statement contained in the Frank Statement?

6 A. This articulation of the purpose of CTR is  
7 inconsistent with the mission that was laid out in  
8 the Frank Statement.  
9 Q. Would Ms. Brown's views promote the process of  
10 creative destruction?  
11 A. No. This approach was clearly designed to  
12 suppress creative destruction.  
13 Q. And have you reviewed Dr. Glenn's testimony  
14 before Congress with respect to the focus of CTR  
15 research as of the 1990s?  
16 A. Yes, I did.  
17 Q. Would you turn to Exhibit 4700, please. This  
18 concerned testimony by Dr. Glenn, who was then the  
19 former scientific director of CTR and the present CEO  
20 of CTR before Congress in the spring of 1994. Do you  
21 understand that?  
22 A. Yes.  
23 Q. All right. And if you would direct your  
24 attention to page 368 of that exhibit. A transcript  
25 appears there of a portion of the sworn testimony

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1 that Dr. Glenn gave before a congressional committee;  
2 correct?  
3 A. Yes.  
4 Q. All right. Directing your attention to the  
5 second question that appears on that page,  
6 Congressman Synar asks Dr. Glenn whether he's  
7 familiar with the CTR council report of 1993, and Mr.  
8 Glenn indicates that he is.  
9 A. Yes.  
10 Q. And then how does the exchange continue?  
11 A. The congressman asks: "Out of the 296 studies  
12 in your index, where you funded about 19.5 million in  
13 grants; as I see from the index only 10 or about 10  
14 of the projects have anything to do with tobacco. Do  
15 you dispute that?"  
16 And Mr. Glenn says, "No, sir."  
17 Q. Okay. And does Mr. Glenn then go on to explain  
18 the basis for the disparity between studies that are  
19 focused on smoking and health versus other types of  
20 studies?  
21 A. Yes, he does.  
22 Q. What does he say?  
23 A. He says, "Because, Mr. Synar, medical research  
24 in general has taken the turn towards basic  
25 fundamental understanding of cell regulation and

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1 deregulation. Until we understand these processes,  
2 we cannot explain any diseases. And our research is  
3 at the forefront, along with the National Cancer  
4 Institute and the National Institutes of Health and  
5 the various other private funding agencies."  
6 Q. How do Dr. Glenn's views on that subject compare  
7 with Attorney Brown's views as expressed in the  
8 previous exhibit that was authored some 26 years  
9 previously?  
10 A. Well he's basically 26 years later still making

11 the same argument, which is we've got to work on  
12 basic fundamental understanding before we can turn to  
13 the specific question of the connection between  
14 smoking and health.

15 Q. In your review of the industry's internal  
16 documents, have you found documents that indicated  
17 attempts to suppress research that was occurring in  
18 the field of smoking and health?

19 A. Yes, I have.

20 Q. Would you turn to Exhibit 13909, please. Is  
21 this one of the documents you relied upon in forming  
22 your opinions, Dr. Jaffe?

23 A. Yes.

24 Q. And is this document consistent with other  
25 documents that you've reviewed on the same subject?

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1 A. Yes, it is.

2 MR. GILL: We'll offer, Your Honor, Exhibit  
3 13909.

4 MR. BLEAKLEY: No objection, Your Honor.

5 THE COURT: Court will receive 13909.

6 BY MR. GILL:

7 Q. Now this is a three-page document; is it not?

8 A. That's correct.

9 Q. And if we go to the second page, we see that it  
10 relates to a report dealing with the Auerbach-Hammond  
11 paper.

12 A. That's correct.

13 Q. And if we go to the last page, we see the  
14 author.

15 A. Yes. It's by I. W. Hughes from Brown &  
16 Williamson.

17 Q. And he also gives the date.

18 A. February 11th, 1970.

19 Q. All right. And I'd like you to assume that Dr.  
20 Hughes was then a scientist working for Brown &  
21 Williamson and that he ultimately served as the  
22 president and CEO of Brown & Williamson during the  
23 period 1980 to 1986.

24 A. Okay.

25 Q. Now from your review of the internal documents

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1 of the industry, do you have some understanding of  
2 the nature of the work that Dr. Auerbach was doing in  
3 connection with smoking and health?

4 A. Yes. Dr. Auerbach had conducted an experiment  
5 or a series of experiments where he had dogs inhale  
6 cigarette smoke through an incision in their throat,  
7 and he found -- or he reported that he had found that  
8 several of the dogs that were smoking had developed  
9 lung cancer.

10 Q. Now in your analysis of this matter, did you try  
11 to evaluate the merits of Dr. Auerbach's discoveries  
12 in either direction?

13 A. No. My purpose was not to determine whether Dr.  
14 Auerbach's results were valid or not, my purpose was  
15 to look at how the companies dealt with this in order

16 to understand whether they were acting consistent  
17 with what I believe to be the collusive agreement or  
18 whether they were acting with respect to this event  
19 in a way I would expect competitive firms to act.  
20 Q. Now directing your attention back to the first  
21 paragraph of the report by Dr. Hughes, does he set  
22 forth there his general assessment of Dr. Auerbach's  
23 work as of February 1970?

24 A. Yes. He says, "Although open to criticism on  
25 several counts, the general standard of the paper is

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1 good. I am of the view that" -- that is Dr.  
2 Hughes -- "that this shows it is now possible to  
3 produce tumors in the respiratory system of an animal  
4 by direct inhalation."

5 Q. All right. And then if you go to the very last  
6 paragraph of the report on page two -- actually it is  
7 the third page of the exhibit, but it's marked page  
8 two on the report. It's labeled (h).

9 A. Yes, I see that.

10 Q. Does he basically sum up his views with respect  
11 to this Auerbach research there?

12 A. Yes. He says, "All the above" -- meaning his  
13 various analyses of the paper -- "All the above leads  
14 me to the view that correlation with the human is  
15 still way off; but I accept that significant  
16 tumorigenic conditions following inhalation has been  
17 achieved."

18 Q. Now at the very beginning of this exhibit, did  
19 Dr. Hughes express some other thoughts regarding the  
20 potential implications of the Auerbach work?

21 A. Yes.

22 Q. All right. Let's go back, then, to the very  
23 first page of Exhibit 13909. What is Dr. Hughes  
24 discussing there?

25 A. Well he's, in effect, thinking about the

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1 implications of the Auerbach work for the industry,  
2 and he says, "I would imagine that the industry could  
3 be asked what it's going to do following the Auerbach  
4 publication.

5 "Is it possible to adopt the stance that 'the  
6 work is significant and important, and the industry  
7 will sponsor a research project (in which Auerbach  
8 collaborates) aimed at repeating the experiment under  
9 statistical control to determine the significance of  
10 the rate of incidence of invasive squamous carcinoma  
11 in relation" --

12 Q. Now let -- let me interrupt you right there. As  
13 far as you can tell, Professor Jaffe, did the  
14 industry ever undertake -- undertake those types of  
15 studies?

16 A. No, it didn't.

17 Q. Please continue.

18 A. And then he says, "(This type of experiment  
19 needs to be done so that the industry can become  
20 aware of how it might have to change its products, as

21 inhalation techniques and experimental procedures  
22 become more sophisticated and possibly produce even  
23 more damaging results.)"  
24 Q. Now how do the last thoughts expressed there by  
25 Dr. Hughes on the implications of the Auerbach work  
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1 relate, if at all, to the process of creative  
2 destruction?  
3 A. Well I think what Dr. Hughes is saying here is  
4 very similar to something I said earlier, which is  
5 that if these companies were competing, then findings  
6 of this sort would be viewed as something that  
7 required a competitive response, that required the  
8 companies to think about the consequences for their  
9 own research program, and what he's saying is, you  
10 know, this -- this seems to be an important result  
11 and we need to be doing the work that's going to put  
12 us in a position to deal with similar results as they  
13 come out in the future.  
14 Q. Professor Jaffe, did you come across any  
15 documents that indicated that CTR and other cigarette  
16 companies also took an interest in Dr. Auerbach's  
17 work?  
18 A. Yes.  
19 Q. All right. Would you go to Exhibit 12607. Is  
20 this a document that you relied upon in forming your  
21 opinion, Dr. Jaffe?  
22 A. Yes.

23 MR. GILL: Your Honor, we'll offer 12607.

24 MR. BLEAKLEY: No objection.

25 THE COURT: Court will receive 12607.

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1 BY MR. GILL:  
2 Q. Now first of all, Professor Jaffe, let me ask  
3 you: Did you gain an understanding as to whether or  
4 not CTR, as a funding organization, played any role  
5 in the Auerbach beagle studies?  
6 A. I haven't seen any evidence that they were  
7 providing research support to Dr. Auerbach.  
8 Q. Now Exhibit 12607 is a document produced by RJR;  
9 is that correct?  
10 A. Yes, that's correct.  
11 Q. It's an interdepartment memorandum to Mr.  
12 Vassallo, who was vice-president of research and  
13 department at RJR, in November of 1970, and it's from  
14 Dr. Murray Senkus, who was the director of research  
15 and development at that time.  
16 A. That's correct.  
17 Q. And it concerns "MINUTES OF MEETING TO DISCUSS  
18 RESULTS OF EXPERIMENTS WITH SMOKING DOGS CONDUCTED BY  
19 DR. OSCAR AUERBACH" at the office of The Council for  
20 Tobacco Research on November 3, 1970; correct?  
21 A. Yes. Yes.  
22 Q. This meeting, then, occurred approximately nine  
23 months after Dr. Hughes had offered his assessment of  
24 the implications of the Auerbach beagle study;  
25 correct?

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- 1 A. That's correct.  
2 Q. All right. And does the memorandum then go on  
3 to identify the participants of this meeting?  
4 A. Yes.  
5 Q. And could you summarize what's contained in that  
6 section, please.  
7 A. Well the first group of participants, Dr.  
8 Kensler, Dr. Spears, Dr. Wakeham and Dr. Senkus, are  
9 scientists; the latter three are scientists employed  
10 by tobacco companies. I believe Dr. Kensler was an  
11 outside consultant to the tobacco industry.  
12 Q. And it indicates that they are TWG participants.  
13 What is a TWG participant?  
14 A. The TWG was the Tobacco Working Group which had  
15 been set up by the government through the National  
16 Cancer Institute that involved both scientists from  
17 the industry as well as outside the industry working  
18 on the issue of the possibility of a safer cigarette.  
19 Q. And so it indicates above that a discussion was  
20 held preliminary to the presentation to be made by  
21 Dr. Auerbach to the Tobacco Working Group of the  
22 National Cancer Institute on November 9, 1970.  
23 A. That's correct.  
24 Q. So six days before that meeting, the meeting is  
25 occurring at CTR in which four of the members of this

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- 1 TWG working group that will be hearing Dr. Auerbach  
2 are now going to be discussing his work.  
3 A. That's correct.  
4 Q. Who else was participating?  
5 A. Well the next group of participants, there's a  
6 Dr. Fagan, who apparently has some affiliation with  
7 Philip Morris, and then two individuals, Mr. Holtzman  
8 and Mr. Hall from the legal department at Philip  
9 Morris, and a Mr. Shinn from the law firm of Shook,  
10 Hardy in Kansas City.  
11 Q. Who else was there?  
12 A. And last group are the CTR staff, basically  
13 either employees of the CTR, and then also Dr.  
14 Sheldon Sommers, who's the chairman of the SAB.  
15 Q. And Dr. Sommers at that point had apparently  
16 succeeded Dr. Little?  
17 A. Well he's indicated here as the chairman of the  
18 SAB.  
19 Q. All right. And so there may be the chairman of  
20 the SAB as well as the scientific director of the  
21 CTR?  
22 A. As I understand it, those were typically  
23 different people.  
24 Q. They were typically different people?  
25 A. Different people, yes.

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- 1 Q. Okay.

2 A. I'm not sure who was the scientific director as  
3 of 1970, whether it was still Dr. Little or whether  
4 that was after he left.  
5 Q. But in any case, Dr. Sommers is referenced under  
6 the heading of "CTR Staff."  
7 A. That's correct.  
8 Q. And Drs. Kreisher, Lisanti and Hockett are all  
9 associate scientific directors; are they not?  
10 A. Yes.  
11 Q. All right. Does the last paragraph, then,  
12 indicate what occurred at the meeting?  
13 A. Yes. It says, "The medical people at the  
14 meeting, namely, Fagan, Kreisher, Lisanti, Hockett  
15 and Sommers, emphasized the following points which  
16 should be raised with Dr. Auerbach after his  
17 presentation with the NCI on November 9:"  
18 Q. All right. Now before we go to the next page,  
19 let me ask you whether --  
20 In your opinion, is the makeup of this group of  
21 people that got together on this day consistent with  
22 the pledge in the Frank Statement that CTR would  
23 assist the research effort impartially with respect  
24 to the smoking-and-health issues that had arisen?  
25 A. Well again if the -- if the purpose of this

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1 meeting within the broader context of CTR was to  
2 learn the truth, the presence at the meeting of the  
3 lawyers from both Philip Morris and from an outside  
4 law firm would seem to suggest the possibility of  
5 conflict of interest.  
6 Q. All right. Let's go on --  
7 MR. BLEAKLEY: I didn't hear the last part  
8 to that question.  
9 THE COURT: "Conflict of interest."  
10 MR. BLEAKLEY: I object to that, move to  
11 strike that as irrelevant, improper, and not within  
12 the scope of this witness's expertise.  
13 THE COURT: Sustained.  
14 Why don't we take a break and go to lunch.  
15 MR. GILL: Thank you, Your Honor.  
16 THE CLERK: Court stands in recess, to  
17 reconvene at 1:45.  
18 (Recess taken.)  
19  
20  
21  
22  
23  
24  
25

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1 AFTERNOON SESSION.  
2 THE CLERK: All rise. Court is again in  
3 session.  
4 (Jury enters the courtroom.)  
5 THE CLERK: Please be seated.  
6 THE COURT: Counsel.



7 MR. GILL: Thank you.  
8 Good afternoon, Your Honor. Good afternoon  
9 ladies and gentlemen.  
10 (Collective "Good afternoon.")  
11 BY MR. GILL:  
12 Q. Good afternoon, Professor Jaffe.  
13 A. Good afternoon, Mr. Gill.  
14 Q. When we broke for lunch, I believe we were  
15 discussing Exhibit 12607. Could you turn to the  
16 first page of that exhibit, please.  
17 A. Yes, I have it.  
18 Q. I think we mentioned down at the very bottom of  
19 that page there was an indication that the group of  
20 people who had gathered at CTR on November 4, 1970  
21 were going to have a discussion about points which  
22 should be raised with Dr. Auerbach after his  
23 presentation at the National Cancer Institute, which  
24 was six days away.  
25 A. That's correct.

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1 Q. And then the memo goes on on page two to list  
2 three points that the group intends to raise with Dr.  
3 Auerbach.  
4 A. That's correct.  
5 Q. And in this context, the group would apparently  
6 be the participants in this meeting who happened to  
7 be members of the TWG committee of NCI.  
8 A. That's right.  
9 Q. Now the -- the first is -- is rather difficult  
10 to read. What -- what is being discussed in the  
11 second of the three points that are going to be  
12 raised after Professor Auerbach speaks at NCI?  
13 A. The second point is essentially a -- a criticism  
14 about the way the experiment was conducted. It says,  
15 "first, the surgeries on the tracheas and then the  
16 insertion of plastic smoking tubes into the incisions  
17 no doubt were disturbing to the dogs. These  
18 conditions probably caused chronic infections,  
19 hemorrhaging, swelling of tissues - just a whole host  
20 of traumatic and damaging experiences. It was  
21 reported that the dogs were docile and friendly and  
22 appeared to enjoy the smoking." And then it says,  
23 "This is a misinterpretation" because "in the desire  
24 to please, the dogs covered up the stress and  
25 trauma."

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1 Q. So the members discussed the notion that somehow  
2 the dogs covered up the stress from this trauma  
3 induced by Dr. Auerbach's experiment due to a desire  
4 to please Dr. Auerbach?  
5 A. That's what --  
6 MR. BLEAKLEY: Objection, Your Honor, he's  
7 leading the witness again.  
8 THE COURT: It is leading.  
9 Q. Now let's move on, Professor Jaffe, to the next  
10 point that the participants discussed.  
11 A. Yes. The next point has to do with the slides

12 in which Dr. Auerbach shows that in his judgment  
13 there had been cancerous -- cancers developed in  
14 dogs. And it says -- it says, "In medical terms  
15 these are referred to as squamous cell carcinoma.  
16 And "In Dr. Sommers' opinion, the photographic  
17 quality of the slides is unbelievably poor." And he  
18 couldn't understand why Dr. Auerbach did not employ  
19 the readily available professional skills for the  
20 preparation of the slides.  
21 Q. And then he goes on to discuss "Purely on the  
22 basis of the quality of the slides, the  
23 interpretation is meaningless...?"  
24 A. He said it's meaningless. And then the next  
25 paragraph says, "Under any circumstances, only one of  
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1 the slides suggests a carcinoma."  
2 Q. Now we had previously reviewed Dr. Hughes' of  
3 B&W assessment of the Auerbach work some nine months  
4 before.  
5 A. That's correct.  
6 Q. How does this assessment compare with Dr.  
7 Hughes' assessment?  
8 MR. BLEAKLEY: Objection, Your Honor, this  
9 goes beyond this witness's competence.  
10 THE COURT: Well you can compare what you  
11 read.  
12 A. Well Dr. Hughes indicated in his memo that  
13 although there were questions about the technique,  
14 that it was his opinion that on the whole it did show  
15 that tumorigenic response had been elicited.  
16 Q. Now we've seen that three of the participants in  
17 this meeting at CTR were attorneys; is that correct?  
18 A. That is correct.  
19 Q. Two were in-house attorneys at Philip Morris,  
20 and the third was an outside attorney from the firm  
21 of Shook, Hardy.  
22 A. That's correct.  
23 Q. From an economic point of view, Professor Jaffe,  
24 what type of incentive would attorneys for cigarette  
25 companies have had with respect to the notion of  
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1 pursuing Dr. Auerbach's experimental work through  
2 further funding?  
3 MR. BLEAKLEY: Objection, Your Honor, it  
4 calls for speculation, it's irrelevant.  
5 THE COURT: You may answer.  
6 A. Well I think the economic incentive of the  
7 lawyers would have been to preserve the financial  
8 interests of their clients, the tobacco companies,  
9 which would have --  
10 So for that reason they would have desired to  
11 undermine the credibility of Dr. Auerbach's results.  
12 MR. BLEAKLEY: Move to strike that answer,  
13 Your Honor.  
14 THE COURT: Yes. That's non-responsive.  
15 Q. Professor Jaffe, were there any other occasions  
16 that you found in your review of the industry's

17 internal documents where CTR and industry  
18 representatives addressed Dr. Auerbach's work?  
19 A. Yes.  
20 Q. Would you move to Exhibit 12296, please. This  
21 is another memorandum produced from the files of RJR;  
22 is that correct?  
23 A. That is correct.  
24 Q. And the date of this memorandum is December 22,  
25 1971?

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1 A. That's correct.  
2 Q. So we're just about one year beyond the date of  
3 the last memorandum?  
4 A. Little more than a year, yes.  
5 Q. And this is another memorandum that's to Mr.  
6 Vassallo?  
7 A. That's correct.  
8 Q. And again as seen on page one, the author is Dr.  
9 Senkus.  
10 A. That's correct.  
11 Q. And this is another meeting at The Council for  
12 Tobacco Research that occurred on December 21, 1971,  
13 as shown in the upper left-hand corner.  
14 A. That's correct.  
15 Q. Does it indicate the purpose of this meeting?  
16 A. Yes. It says the meeting was held at CTR to  
17 discuss further Auerbach smoking experiments on dogs  
18 under the sponsorship of the NCI.  
19 Q. So Dr. Auerbach is apparently seeking further  
20 funding from NCI to do additional research work  
21 relating to smoke-inhalation studies involving dogs.  
22 A. That's correct.

23 MR. BLEAKLEY: Objection, Your Honor,  
24 leading.

25 THE COURT: Well it is leading. I'll let  
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1 it stand.  
2 Q. Who was present at this meeting?  
3 A. Well again there's a list of participants on the  
4 first page. There's three people from The Council  
5 for Tobacco Research, Vincent Lisanti, William Hoyt  
6 and Robert Hockett; three people from Philip Morris,  
7 Alex Holtzman, Roger Saleeby and Helmut Wakeham; and  
8 two people from RJR, Mr. Roemer and Murray Senkus.  
9 Q. And Mr. Holtzman was one of the participants in  
10 the meeting that occurred approximately a year  
11 before?  
12 A. As indicated in the previous document, yes.  
13 Q. And he's an in-house attorney at Philip Morris.  
14 A. That's correct.  
15 Q. Are you aware of the fact that Mr. Roemer was an  
16 in-house attorney at RJR at that time?  
17 A. I believe that's correct, yes.  
18 Q. All right. What's indicated in the first  
19 portion of the next section dealing with the  
20 background to this meeting?  
21 A. Well what it indicates is that the NCI --

22 (clearing throat) excuse me -- is negotiating with  
23 Auerbach to conduct further smoking experiments on  
24 dogs, and these additional experiments, it says, as  
25 defined by the NCI, the objective would be to

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1 determine the effect of nicotine on smoking dogs.

2 Q. From what you've reviewed in the documents, does  
3 the type of research that Dr. Auerbach was now  
4 proposing to be funded at NCI have anything to do  
5 with the issue of smoking and health?

6 A. Yes, I think it would, because it would -- it  
7 would -- by looking at the effect of nicotine on  
8 dogs, it would provide potentially useful information  
9 about the effect of nicotine on humans.

10 Q. If we look at the next page of this exhibit,  
11 does it indicate what conclusions this group of  
12 people reached with respect to their attitude toward  
13 Dr. Auerbach's request for funding?

14 A. Yes. It says, "It was concluded that discussion  
15 of the pertinent scientific data with Dr. Gori will  
16 convince him that the Auerbach experiments should be  
17 abandoned. The staff at CTR will assemble the  
18 information that is to be submitted to Dr. Gori. The  
19 Research Directors of the tobacco companies will meet  
20 with the CTR staff on January 17 to prepare the final  
21 report at that time. In a telephone conversation,  
22 Dr. Gori has agreed to meet with the Research  
23 Directors on January 18 to discuss these data."

24 Q. From an economic point of view, Professor Jaffe,  
25 what type of competitive behavior is being discussed

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1 in that paragraph?

2 A. Well I think, taken in connection with the Frank  
3 Statement and what the companies indicated the  
4 function of CTR was going to be, which was going to  
5 be to try to learn the truth about smoking and health  
6 and communicate it, it seems to me it's  
7 anti-competitive for the CTR and the research  
8 directors of the companies instead to expend their  
9 efforts at trying to convince some other funding  
10 agency of the national -- of the government not to  
11 fund this research. If -- if they believed it was  
12 not valid research, obviously, they could choose  
13 themselves not to fund it. But I don't see within  
14 the mission of the Frank Statement why these folks  
15 would have gotten together to try to convince the  
16 federal government not to engage in a certain kind of  
17 research related to smoking and health.

18 Q. Would the very type of research that Dr.  
19 Auerbach was proposing have fallen within the mission  
20 statement of CTR?

21 A. Yes, I believe so.

22 Q. In these last two exhibits, Professor Jaffe,  
23 we've seen meetings that have occurred between staff  
24 members of CTR, industry scientists and industry  
25 lawyers; is that correct?

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1 A. Yes.  
2 Q. Are these two exhibits --  
3 Are these two documents representative of other  
4 documents that you have reviewed that involve a  
5 similar cast of characters?  
6 A. Yes.  
7 Q. Have you seen any internal documents in which  
8 the cast of characters was extended to the highest  
9 levels of management within these companies?  
10 A. Yes, I have.  
11 Q. Would you turn to Exhibit 10295, please.  
12 Is this a document that you have relied upon in  
13 support of your opinions?  
14 A. Yes.  
15 MR. GILL: We'll offer, Your Honor, Exhibit  
16 10295.  
17 MR. BLEAKLEY: No objection.  
18 THE COURT: Court will receive 10295.  
19 BY MR. GILL:  
20 Q. Just in general, Professor Jaffe, what is this  
21 document?  
22 A. This document is a set of handwritten notes  
23 taken by Helmut Wakeham of a CTR Executive Committee  
24 meeting on November 30th of nineteen seventy -- I  
25 guess on my copy I cannot see the complete date, but

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1 I believe it was sometime in the early '70s, and  
2 these are Dr. Wakeham's notes of the meeting.  
3 Q. What is the rectangle, the vertical rectangle  
4 that appears in the middle of the first page?  
5 A. That appears to be the table around which the  
6 meeting was held, and what Dr. Wakeham has done is  
7 written in the names of the participants in the  
8 meeting, where they sat at the meeting.  
9 Q. And do you see the initials HW in the lower  
10 right-hand corner of the table?  
11 A. Yes.  
12 Q. That's apparently Dr. Wakeham's position?  
13 A. I believe so, yes.  
14 Q. All right. Let's start up at 12:00 o'clock and  
15 work through the identities of the participants in  
16 this meeting of the CTR Executive Committee on  
17 November 30, I believe the evidence will show it's  
18 1970.  
19 First of all we have Hoyt. That would be Dr.  
20 Hoyt of CTR; is that correct?  
21 A. Yes.  
22 Q. And then Ramm?  
23 A. Yes.  
24 Q. Do you know who Mr. Ramm was?  
25 A. Yeah, I believe -- (clearing throat) excuse

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1 me -- I believe Mr. Ramm was from R. J. Reynolds.  
2 Q. And are you aware that in answers to

3 interrogatories, defendants have indicated that Mr.  
4 Ramm was formerly the general counsel of RJR?  
5 A. Yes.  
6 Q. And does this document show that at this  
7 particular meeting he was elected chairman of CTR?  
8 A. Yes. Just below the picture of the table, it  
9 indicates that.  
10 Q. All right. And then going down the right side  
11 of the table, it indicates Dr. Sommers is present?  
12 A. That's correct.  
13 Q. And we've just seen who Dr. Sommers was from the  
14 previous two exhibits.  
15 A. That's right. He was the chairman of the  
16 Scientific Advisory Board of the CTR.  
17 Q. And then outside of Dr. Sommers, to the right on  
18 the exhibit, is Dr. Hockett.  
19 A. Yes. The associate director -- associate  
20 scientific director of CTR.  
21 Q. And below Dr. Sommers is Alec Galloway. We know  
22 who he is; don't we?  
23 A. Yes. He was the chairman of Reynolds.  
24 Q. He was the chairman and CEO of Reynolds Tobacco  
25 until June 18, 1970, approximately five months before

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1 this meeting; correct?  
2 A. Yes. That's a good point.  
3 Q. And below Mr. Galloway is William Smith?  
4 A. Yes.  
5 Q. And according to answers to interrogatories  
6 filed by the defendants in this case, it was Mr.  
7 Smith who succeeded Mr. Galloway as president and CEO  
8 of RJR in June of 1970. Do you understand that?  
9 A. That's my understanding.  
10 Q. And then behind Mr. Smith is Dr. C. C. Little?  
11 A. Yes.  
12 Q. He at this time is the retiring chairman or he's  
13 the retiring scientific director of CTR.  
14 A. That's correct.  
15 Q. Then below Mr. Smith is Lester Pollack, and it's  
16 indicated that he's with Loews Lorillard?  
17 A. I think it says Lorillard, yes.  
18 Q. And behind him is Bob Tisch with Loews  
19 Lorillard. Mr. Tisch was the president and CEO of  
20 Lorillard at that time.  
21 A. That's my understanding.  
22 Q. And below Mr. Pollack is Curtis Judge. Do you  
23 know who he was?  
24 A. I'm forgetting as I sit here.  
25 Q. Mr. Judge was the senior executive at

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1 Lorillard --  
2 A. Okay.  
3 Q. -- and eventually the president and CEO of  
4 Lorillard.  
5 A. Right.  
6 Q. And below Mr. Judge is Arthur Stevens. Do you  
7 recall that Arthur Stevens is the general counsel of

8 Lorillard?  
9 A. Okay.  
10 Q. And below him is Mr. Holtzman, the attorney that  
11 we've seen on the previous exhibits from Philip  
12 Morris.  
13 A. Yes, I understand that.  
14 Q. Now the --  
15 We haven't been able to identify the two  
16 gentlemen outside of Stevens and Holtzman, Brooks and  
17 whatever the other name is, but continuing down below  
18 Mr. Wakeham, we have Mr. Bowling. Do you understand  
19 that he was a senior attorney at Philip Morris?  
20 A. That's correct.  
21 Q. And Mr. Cullman, who was the president and CEO  
22 of Philip Morris.  
23 A. That's correct.  
24 Q. And then going up the table we have P. Smith.  
25 Do you remember who Paul Smith was?

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1 A. No, I'm afraid I don't.  
2 Q. From the earlier exhibit with regard to the  
3 letter to the Committee of Counsel from Mr. Yeaman,  
4 do you recall that Mr. Smith was the general counsel  
5 of Philip Morris?  
6 A. Okay. That's right.  
7 Q. And above him is Mr. Finch, Ed Finch. The  
8 defendants have indicated that he was a senior  
9 executive, and I believe president at that time, of  
10 Brown & Williamson; right?  
11 A. Right.  
12 Q. Outside of those gentlemen would be J. Brown.  
13 Do you recognize that name?  
14 A. I would believe that's Janet Brown, who was an  
15 outside attorney for American Tobacco.  
16 Q. And above Mr. Finch would be Mr. Yeaman, the  
17 general counsel of Brown & Williamson?  
18 A. Brown & Williamson, right.  
19 Q. And later the CEO of the CTR.  
20 A. Right.  
21 Q. And above him would be Mr. Hetsko. We know Mr.  
22 Hetsko?  
23 A. Yes. He's the general counsel of American  
24 Tobacco.  
25 Q. And outside of Mr. Hetsko and just above him

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1 would be Mr. Kornegay. Do you recognize his name?  
2 A. Yes. I believe he's the head of The Tobacco  
3 Institute.  
4 Q. So The Tobacco Institute president is also  
5 attending the CTR executive board meeting.  
6 A. The notes indicate that, yes.  
7 Q. And above Mr. Hetsko would be B. Walker. Do you  
8 understand that he was the president and CEO at the  
9 time of American Tobacco?  
10 A. Yes.  
11 Q. And outside of him would be Mr. Hardy. Do you  
12 know who Mr. Hardy was?

13 A. I believe he's an attorney with Shook, Hardy,  
14 one of the outside law firms.  
15 Q. And above him would be Mr. Heimann, whose  
16 deposition you reviewed.  
17 A. Yes. Another top executive from American  
18 Tobacco.  
19 Q. And who succeeded Mr. Walker as president and  
20 CEO of American.  
21 A. Okay.  
22 Q. And then at the top of the table on the left  
23 side would be Mr. Shinn. Do you recall seeing his  
24 name on one of the previous exhibits?  
25 A. Yes. He was identified in one of the previous  
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1 exhibits as an attorney, an outside attorney.  
2 Q. Now just below the table, as you previously  
3 indicated, there's a section that deals with  
4 proceedings, and apparently the first proceeding that  
5 occurred was the election of Mr. Ramm as chairman.  
6 A. Yes, that's correct.  
7 Q. And if you'd look at the third page of this  
8 exhibit, in the middle of that third page there's an  
9 indication that Mr. Ramm makes a statement.  
10 A. Yes. It says "Ramm" --  
11 Q. See that?  
12 A. "Ramm - makes statement."  
13 Q. And he first mentions what the purpose of the  
14 CTR is.  
15 A. That's correct.  
16 Q. And then his statements, according to Dr.  
17 Wakeham's notes, appear to continue through the  
18 remainder of that page into the next page; is that  
19 correct?  
20 A. Yes, that's correct.  
21 Q. Going to the next page, it becomes a little bit  
22 difficult to read, but about one-third of the way  
23 down do you see a reference to Dr. Little?  
24 A. Yes. It says, "Little has served well," and  
25 then has a dash and it says, "Scientific Director  
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1 Emeritus."  
2 Q. What's your interpretation of that?  
3 A. My interpretation of that is that Dr. Little is  
4 stepping down as scientific director and will take  
5 the title of scientific director emeritus.  
6 Q. And then a few lines below, does Dr. Wakeham  
7 indicate that there was some discussion with respect  
8 to the nature of the person who should replace Dr.  
9 Little?  
10 A. Yes. It's a few lines down and it says, "Expect  
11 scientific director to be dedicated to the 'truth',"  
12 and the word "truth" is in quotation marks.  
13 Q. Are you accustomed to seeing the word "truth"  
14 used in quotation marks?  
15 MR. BLEAKLEY: Objection, Your Honor. I  
16 don't think that his seeing the word "truth" in  
17 quotation marks is relevant.



18 MR. GILL: I'll ask it another way, Your  
19 Honor.  
20 THE COURT: Rephrase it.  
21 BY MR. GILL:  
22 Q. Based on your interpretation of this document,  
23 Professor Jaffe, what is the significance of placing  
24 "truth" in quotes?  
25 MR. BLEAKLEY: Objection, Your Honor, it  
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1 calls for speculation.  
2 THE COURT: You may answer if you know.  
3 A. Well I would have expected, based on the Frank  
4 Statement, that the scientific director would be  
5 dedicated to the truth without quotation marks.  
6 Q. And is there a further discussion on this page  
7 with respect to locating a scientific director who  
8 will be dedicated to the, quote, truth, unquote?  
9 A. Yes. A little --  
10 It continues in the next set of notes, it says  
11 that Spencer Stuarts & Associates are searching, it  
12 mentions someone in Philadelphia and five other  
13 candidates, and then it says "Legal counsels  
14 interview and scientific directors of companies can  
15 give valuable assistance."  
16 Q. And what's your interpretation of that  
17 discussion?  
18 A. It's indicating that the legal counsels are  
19 going to interview the candidates for scientific  
20 director.  
21 Q. The candidates who must be dedicated to the  
22 truth.  
23 A. That's correct.  
24 Q. And just above the reference to Spencer Stuart &  
25 Associates is there an indication of the priority  
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1 that the -- that Mr. Ramm places upon the location of  
2 such an individual?  
3 A. Yes. It says, "Finding scientific director most  
4 important and first order of business."  
5 Q. Now did Dr. Wakeham write a follow-up memo to  
6 this one?  
7 A. Yes, he did.  
8 Q. Would you turn to Exhibit 11586, please.  
9 A. I have it.  
10 Q. Now this is a memorandum that Mr. -- Dr. Wakeham  
11 writes to Mr. J. F. Cullman III, who of course  
12 attended the executive board meeting as shown in  
13 these notes.  
14 A. That's correct.  
15 Q. And the date is December 8, 1970.  
16 A. Yes, about 10 days after the meeting actually  
17 occurred, which is referred to in the first line of  
18 the memo itself.  
19 Q. So we know that this memo is in reference to the  
20 handwritten notes of Dr. Wakeham because he  
21 specifically mentions that this memo is with respect  
22 to the November 30 meeting of the CTR Executive

23 Committee; is that right?

24 A. That's correct.

25 Q. And what is the subject of this memo?

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1 A. Well the title is "'Best' Program for CTR," and  
2 he's giving Mr. Cullman some views about what should  
3 happen with CTR.

4 Q. Does he ask in the first paragraph, "What kind  
5 of CTR program is best for the industry?"

6 A. Yes.

7 Q. And does he provide some observations with  
8 respect to that subject matter as the memo continues?

9 A. Yes, he does. The first thing he does under his  
10 number one stated objective or purpose of the CTR, he  
11 has here in quotation marks, "'To aid and assist  
12 research into tobacco use and health, and to make  
13 available to the public factual information on this  
14 subject, close quote."

15 Q. Now is that part consistent with the mission  
16 statement of CTR --

17 A. Yes.

18 Q. -- as set forth in the Frank Statement?

19 A. Yes, it is.

20 Q. Okay.

21 A. And he says, "This is a very broad statement  
22 which has been interpreted more narrowly to," and he  
23 quotes again, "'providing financial support for  
24 research by independent scientists...' 'to provide  
25 significant data about lung cancer, heart disease,

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1 chronic respiratory ailments, and other diseases,'" and he indicates that that second quote is from the  
2 1968-'69 report of the scientific director of the  
3 CTR-USA.

4 Q. So the more narrow interpretation is the  
5 interpretation provided by the scientific director of  
6 CTR?

7 A. That's right. He's quoting the report of the  
8 scientific director who has narrowed the original  
9 focus and is now -- is describing it in terms of  
10 essentially basic research about these diseases  
11 rather than the broader statement about tobacco use  
12 and health.

13 Q. And who authored the 1968-'69 report of the  
14 scientific director?

15 A. Dr. Little.

16 Q. And how consistent is the statement attributed  
17 to Dr. Little with respect to the '68-'69 report to  
18 the earlier sentiments expressed by Dr. Little with  
19 respect to the focus of CTR research?

20 A. They are very consistent.

21 Q. Now what is your interpretation of this  
22 particular paragraph in terms of its significance?

23 A. Well essentially it's just another indication,  
24 as perceived by Dr. Wakeham right after this

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1 important Executive Committee meeting, that as of  
2 this time in 1970 Dr. Little has taken the broad  
3 statement of research into tobacco use and health and  
4 narrowed it in terms of a more focused program that  
5 looks more at the diseases than at the connection  
6 between tobacco use and health.

7 Q. Then there's a second stated objective of the  
8 purpose of CTR as set forth by Dr. Wakeham; is there  
9 not?

10 A. Yes.

11 Q. He says, "It has been stated that CTR is a  
12 program to find out, quote, the truth about smoking  
13 and health, unquote. What is truth to one is false  
14 to another. CTR and the Industry have publicly and  
15 frequently denied what others find as, quote, truth,  
16 unquote. Let's face it. We are interested in  
17 evidence which we believe denies the allegation that  
18 cigarette smoking causes disease."

19 What is your interpretation of the significance  
20 of that statement?

21 A. Well that statement, particularly taken together  
22 with the notes that we saw a few minutes ago where  
23 that same word, "truth" in quotes, appeared at the  
24 meeting where the CEOs of all of the companies were  
25 sitting around the table discussing the future of CTR

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1 and the need for a new scientific director dedicated  
2 to finding the truth, in quotation marks, I believe  
3 that Dr. Wakeham is now telling us exactly what that  
4 meant, which was that we're interested in evidence  
5 which we believe denies the allegation that cigarette  
6 smoking causes disease, which is not the mission that  
7 was set out for the CTR in the Frank Statement.

8 MR. BLEAKLEY: Your Honor, I move to strike  
9 that answer as speculative, non-responsive, and  
10 beyond the expertise of this witness.

11 THE COURT: Well the answer will stand.

12 BY MR. GILL:

13 Q. Professor Jaffe, can you summarize for us at  
14 this time your opinions with respect to the role that  
15 CTR played in the prong of the conspiracy related to  
16 the reassurance of smokers and suppression of  
17 unfavorable research?

18 A. Yes. What we've seen from the documents that  
19 we've looked at, beginning, really, in the very  
20 beginning of CTR in the 1950s, going through the  
21 1960s and 1970s, and then continuing even with the  
22 testimony of Dr. Glenn in the '90s, is that what was  
23 originally portrayed as an effort to find out the  
24 truth about smoking and health and convey that to  
25 smokers instead was used essentially as a cover.

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1 They funded scientific research, they funded good  
2 scientific research, but the scientific research that  
3 they funded was aimed generally at understanding the

4 mechanisms of disease, was not primarily focused on  
5 determining whether or not smoking was harmful, and  
6 in those occurrences where they did fund research  
7 that found evidence that smoking was harmful, that  
8 information was not treated as significant  
9 information, was not highlighted by the scientific  
10 director or presented to the public as being the  
11 significant findings that in 1954 they said they were  
12 going to pursue.

13 Q. Professor Jaffe, did The Tobacco Institute also  
14 play a role in the industry's efforts to reassure  
15 smokers and to suppress the impact of unfavorable  
16 research findings?

17 A. Yes.

18 Q. Would you turn to Exhibit 14573, please. Is  
19 this a document that you've relied upon in forming  
20 your opinions, Professor Jaffe?

21 A. Yes.

22 MR. GILL: We'll offer, Your Honor, Exhibit  
23 14573.

24 MR. BLEAKLEY: Excuse me a moment, Your  
25 Honor.

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1 No objection.

2 THE COURT: Court will receive 14573.

3 BY MR. GILL:

4 Q. Professor Jaffe, this exhibit is a memorandum  
5 sent to Mr. Kloepper at The Tobacco Institute;  
6 correct?

7 A. Yes, that's what it indicates.

8 Q. And the date is October 18, 1968?

9 A. Yes.

10 Q. And it is from Hill & Knowlton?

11 A. Yes.

12 Q. And the subject is, "Tobacco and Health Research  
13 Procedural Memo."

14 A. Yes, that's correct.

15 Q. All right. And the author indicates that as  
16 requested, this is a memo on the writing and  
17 production of Tobacco Health and Research.

18 A. Tobacco --

19 Q. And then he --

20 A. I'm sorry, Tobacco and Health Research, which is  
21 underlined, indicating that that's a publication that  
22 is going to be produced.

23 Q. And the author indicates the target audience for  
24 this particular publication?

25 A. It says it's doctors and scientists.

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1 Q. And then going to page two, at the top of that  
2 page does the author address what types of stories  
3 this publication ought to focus upon?

4 A. Yes. It says, "The most important type of story  
5 is that which casts doubt on the cause and effect  
6 theory of disease and smoking."

7 Q. Now based upon your review of the internal  
8 documents of the industry, what do you view as the

9 difference between CTR and TI in terms of the roles  
10 they played in the prong of the conspiracy that we've  
11 been discussing?

12 A. Well based on the documents I've seen, they  
13 played similar roles in the sense that they were  
14 actively involved in the reassurance of smokers, with  
15 the difference being that with respect to TI there  
16 was no pretense that the organization was anything  
17 other than a public relations operation of the  
18 industry.

19 Q. Did you also review press releases issued by The  
20 Tobacco Institute over a span of several years?

21 A. Yes, I did.

22 Q. Was there any particular thread that you found  
23 running through those press releases?

24 A. The press releases of TI, and also the press  
25 releases of CTR for that matter, during this period,

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1 tended to focus on emphasizing that causation had not  
2 been proven, that there was still a controversy, and  
3 that more research needed to be done before it could  
4 be concluded that smoking caused disease.

5 Q. Did those press releases of both The Tobacco  
6 Institute and the CTR tend to focus on casting doubt  
7 on the cause-and-effect theory of disease and  
8 smoking?

9 MR. BLEAKLEY: Objection, Your Honor. Mr.  
10 Gill is leading again.

11 THE COURT: Sustained.

12 BY MR. GILL:

13 Q. How would you characterize the focus of those  
14 press releases?

15 A. Well I think, as I indicated in my previous  
16 answer, the focus in the press releases was  
17 undermining the argument that smoking causes disease  
18 and highlighting purported evidence to the contrary.

19 Q. Now based upon the documents that you reviewed,  
20 Professor Jaffe, did CTR and The Tobacco Institute  
21 receive any help in connection with their roles in  
22 the conspiracy?

23 A. Yes.

24 Q. Would you turn to Exhibit 10165, please.

25 All right. This is a handwritten set of notes

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1 dated April 21, 1978.

2 A. That's correct.

3 Q. You understand that the author of this memo has  
4 been identified as Mr. Judge, who in 1978 was the  
5 president and CEO of Lorillard.

6 A. That's my understanding.

7 Q. One of the participants at the CTR Executive  
8 Committee meeting that occurred on November 30th,  
9 1970.

10 A. That's correct.

11 Q. All right. What did you find significant about  
12 this particular document in terms of this prong of  
13 the conspiracy?

14 A. Well in the first paragraph there after the  
15 number one, what Mr. Judge says is that "We have  
16 again 'abdicated' the scientific research directional  
17 management of the Industry to the 'Lawyers' with  
18 virtually no involvement on the part of scientific or  
19 business management side of the business." And from  
20 the point of view of a competitive industry engaged  
21 in, first of all, collectively trying to find out the  
22 truth about disease and then individually competing  
23 to provide consumers with what they wanted, I would  
24 not expect that the scientific directional management  
25 of the industry would be abdicated to the lawyers.

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1 Q. Did --

2 A. Certainly with virtually no involvement of the  
3 scientific or business management.

4 Q. Well based upon your understanding of the role  
5 of the process of creative destruction in bringing  
6 benefits to consumers, what type of role would you  
7 expect scientists to play in such a process versus  
8 attorneys?

9 A. Well I'd expect scientists to be eager to pursue  
10 scientific research, and I would expect management to  
11 be eager to pursue the competitive objectives of the  
12 industry. The lawyers, particularly where they're  
13 clearly talking here about a collective group of  
14 lawyers, not just, for example in Mr. Judge's case,  
15 Lorillard lawyers, I would expect to be interested in  
16 protecting the industry and suppressing that kind of  
17 progress forward.

18 MR. BLEAKLEY: Move to strike the last part  
19 of that answer, Your Honor.

20 THE COURT: Well that will stand.

21 BY MR. GILL:

22 Q. Professor Jaffe, did you find any further  
23 indications as to whether or not Lorillard continued  
24 to oppose the control of lawyers over scientific  
25 research?

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1 A. Yes.

2 Q. Would you look at Exhibit 21127.

3 A. I have it.

4 Q. We'll just let Ms. Sutton catch up.

5 All right, Professor Jaffe, this is an exhibit  
6 that's previously been admitted into evidence. The  
7 first page is a September 18, 1981 letter to Joseph  
8 Greer, Esquire, vice-president and general counsel of  
9 Liggett. Do you see that?

10 A. Yes.

11 Q. And the letter is on the stationery, obviously,  
12 of Webster & Sheffield, a New York law firm, and it's  
13 signed on the second page by a Francis K. Decker,  
14 Jr., --

15 A. Yes.

16 Q. -- an attorney with that firm.

17 Now Mr. Decker is apparently providing some type  
18 of report to Mr. Greer.

19 A. Yes. It indicates in the first line that the  
20 letter is essentially a cover letter for notes taken  
21 at a meeting of the Committee of General Counsel held  
22 on September 10th, 1981 at the law firm of Chadbourne  
23 & Parke.

24 Q. So Mr. Decker apparently attended a meeting of  
25 that group, took some notes, and is providing some  
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1 synopsis of his notes to the general counsel of  
2 Liggett, his client.

3 A. That's my understanding.

4 Q. Okay. If you would go to Bates stamp document  
5 748, please. Now at this portion of the -- of the  
6 report by Mr. Decker of this meeting of the generals  
7 counsel of the cigarette companies, Mr. Decker is  
8 reporting on, first of all, the status of the case,  
9 and then in number three he's reporting on NCI  
10 workshop on sidestream smoke. Do you see that?

11 A. Yes.

12 Q. What's being discussed there?

13 A. Well as it indicates in the paragraph right  
14 below that, Mr. Stevens from Lorillard is reporting  
15 to the group that "Dr. Spears," who's a scientist at  
16 Lorillard, had "said that Tom Owens, Gory's  
17 assistant" -- Gori being a scientist with the  
18 National Cancer Institute -- had "called Spears. NCI  
19 received a grant application re side-stream smoke and  
20 exposure of humans." NCI is proposing to have a  
21 workshop. They've invited a bunch of people to the  
22 workshop, including Dr. Spears. Spears is  
23 recommending that he go.

24 And then the document goes on to show that the  
25 attorneys at this meeting then discussed whether or

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1 not it was desirable for Dr. Spears of Lorillard to  
2 attend this meeting sponsored by the National Cancer  
3 Institute.

4 THE COURT: Counsel, counsel, we'll have to  
5 take a short recess.

6 MR. GILL: Thank you, Your Honor.

7 THE CLERK: Court stands in recess.

8 (Recess taken.)

9 THE CLERK: All rise. Court is again in  
10 session.

11 (Jury enters the courtroom.)

12 THE CLERK: Please be seated.

13 THE COURT: Counsel.

14 MR. GILL: Thank you, Your Honor.

15 BY MR. GILL:

16 Q. Before the break, Professor Jaffe, I think you  
17 were telling us that at Bates stamp page 748 of  
18 Exhibit 21127, a discussion was occurring in which  
19 Mr. Stevens, the general counsel of Lorillard, was  
20 explaining an incident that related to a contact by a  
21 member at NCI to Dr. Spears at Lorillard.

22 A. That's correct.

23 Q. All right. And it related to a proposal that

24 NCI fund a study on sidestream smoke.  
25 A. Yes.

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1 Q. And the date of this document, again, is what?  
2 A. Was in 1981. The meeting was September 10th,  
3 1981.  
4 Q. And the previous document, the handwritten notes  
5 of Mr. Judge with respect to the abdication to  
6 attorneys of scientific direction, that was occurring  
7 in 1978; correct?  
8 A. That's correct.  
9 Q. So we're about three years beyond the time of  
10 the Judge memo here.  
11 A. That's correct.  
12 Q. All right. And now do the attorneys then have a  
13 discussion, according to these notes by Mr. Decker,  
14 of this particular proposal for a research project at  
15 NCI?  
16 A. Yes. There's a discussion of it on page seven.  
17 This Dr. Epstein, who has made the proposal, is  
18 characterized as being anti-tobacco and as being  
19 uncontrollable, and in the end what they conclude is  
20 that if Dr. Spears goes, he may stop us from  
21 attacking him later. And it says, "I am inclined to  
22 let them go."  
23 Q. All right. First of all, Mr. Shinn, the  
24 attorney from Shook, Hardy, has some comments with  
25 respect to Mr. Epstein having made an application and

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1 being in touch with Mr. Panzer at The Tobacco  
2 Institute.  
3 A. Yes.  
4 Q. And then Mr. Finnegan, who was a partner of Mr.  
5 Jacob --  
6 Do you understand that the firm of Jacob  
7 Meninger did outside legal work for the tobacco  
8 industry?  
9 A. Yes.  
10 Q. And they both indicate that Epstein is  
11 uncontrollable and will not help the industry.  
12 A. That's what Mr. Finnegan indicates, yes.  
13 Q. But then Mr. Jacob indicates if Dr. Spears goes  
14 to this meeting, he may stop us from attacking it  
15 later, referring to the Epstein project?  
16 A. I believe so, yes.  
17 Q. And Mr. Stevens says that he is inclined to let  
18 Dr. Spears attend the meeting.  
19 A. Yes.  
20 Q. What do you make of this exchange?  
21 A. Well here we have Dr. Spears, a scientist at  
22 Lorillard who's been contacted by the government  
23 about a meeting, and instead of deciding together  
24 with other people at Lorillard whether it would make  
25 sense from Lorillard's perspective for him to go to

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1 this meeting, this issue is brought to the Committee  
 2 of Counsel, and it's discussed by this group of  
 3 lawyers from all of the companies as well as outside  
 4 attorneys, and it appears that this is exactly the  
 5 kind of control of the scientific directional  
 6 management of the industry being in the hands of  
 7 lawyers that Mr. Judge was referring to about three  
 8 years before.

9 Q. And Dr. Spears has precipitated the entire  
 10 discussion by informing the general counsel of his  
 11 company of the contact from the representative at  
 12 NCI.

13 A. That's correct.

14 Q. Is this incident compatible or incompatible with  
 15 the criticism offered by Mr. Judge three years  
 16 earlier?

17 A. Well it -- it would indicate that Lorillard by  
 18 this point of time, three years later, is going along  
 19 basically with the scientific directional management  
 20 being in the hands of lawyers rather than trying to  
 21 change that.

22 Q. Professor Jaffe, did you review other documents  
 23 that addressed the leadership role of the Committee  
 24 of Counsel regarding the industry's response to  
 25 health issues?

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1 A. Yes.

2 Q. All right. Would you turn to Exhibit 10518,  
 3 please. Is this a document upon which you've relied,  
 4 Professor Jaffe, in forming your opinions?

5 A. Yes.

6 MR. GILL: Your Honor, we'll offer Exhibit  
 7 10518.

8 MR. BLEAKLEY: Your Honor, we do object to  
 9 this document. This is hearsay, it has hearsay  
 10 within hearsay in it.

11 MR. GILL: Your Honor, this document was  
 12 produced from the files of Philip Morris, and it is a  
 13 report prepared by BATCo, apparently in the ordinary  
 14 course of business. It contains admissions under  
 15 801(d)(2), and it furthermore is an exception to the  
 16 hearsay rule with respect to records kept in the  
 17 ordinary course of business under 803(06).

18 THE COURT: The court will receive 10518.  
 19 BY MR. GILL:

20 Q. Now the title of this report is "REPORT ON  
 21 POLICY ASPECTS OF THE SMOKING AND HEALTH STRATEGY IN  
 22 U.S.A."

23 A. I think it says "...SMOKING AND HEALTH SITUATION  
 24 IN THE U.S.A."

25 Q. You're correct. Once again, my glasses have

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1 failed me.

2 Professor Jaffe, does this document --

3 Was this document prepared by a scientist at  
 4 BATCo?

5 A. Yes. That's what the document indicates.  
6 Q. And do you realize that this document, based on  
7 the Bates stamp number, was actually produced in this  
8 case from the files of Philip Morris?  
9 A. That's my understanding, yes.  
10 Q. And if you look in the upper right-hand corner  
11 of this face page of the document, what do you see  
12 there?  
13 A. The initial HW, which we've seen before.  
14 Q. Indicating what?  
15 A. I believe that those are Helmut Wakeham's  
16 initials. This was presumably his copy of this  
17 document.  
18 Q. And that for some reason someone at BATCo  
19 provided a copy of this document to Mr. Wakeham.  
20 A. Yes.  
21 Q. Philip Morris is certainly not part of the BATCo  
22 family of tobacco companies; is it?  
23 A. No.  
24 Q. All right. The document also states at the top  
25 of the face page that it is strictly confidential?

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1 A. That's correct.  
2 Q. Now basically is this document another report  
3 based on meetings with representatives of the tobacco  
4 industry?  
5 A. Yes. That's what it says.  
6 Q. All right. Would you go to the page that bears  
7 the Bates stamp number 101, please. In this portion  
8 of the document the author is reporting on legal  
9 matters and the differences between U.S. and the  
10 United Kingdom?  
11 A. That's correct. That's correct.  
12 Q. All right. In the second paragraph the author  
13 states, "In the U.S., by far the most important  
14 factor conditioning action by the manufacturers is  
15 the law situation and the danger of costly damages  
16 being awarded against the manufacturers in a flood of  
17 cases. Not so long ago the drug industry was faced  
18 with some 300 lawsuits with claims totaled 50 to 60  
19 million dollars, almost all of which in the end were  
20 settled out of court, so this type of danger is real.  
21 The leadership of the U.S. smoking and health  
22 situation therefore lies with the Powerful Policy  
23 committee of senior lawyers advising the industry,  
24 and their policy, very understandably, in effect is,  
25 quote, don't take any chances, unquote."

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1 What is the significance of that language with  
2 respect to the opinions that you have formed in this  
3 case?  
4 A. Well this BATCo document reporting on their  
5 impressions in 1964 on visiting the U.S. is basically  
6 confirming what I said a few minutes ago about that  
7 when -- what the lawyers, particularly acting  
8 collectively as a group from the different companies,  
9 are going to do is they're going to act to try to

10 protect the interests of their clients, which is to  
11 protect the status quo and not take any chances, and  
12 that that is going to tend to be inimical to the  
13 notion of creative destruction, which is inherently a  
14 risky proposition when the firms are freely  
15 competing.

16 Q. Does the author state as much in the final  
17 sentence of that paragraph?

18 A. He says, "It is a situation that does not  
19 encourage constructive or bold approaches to smoking  
20 and health problems, and it also means that the  
21 Policy Committee of lawyers exercises close control  
22 over all aspects of the problems."

23 Q. And is that sentiment expressed in October of  
24 1964 in this report consistent with the sentiment  
25 expressed by Mr. Judge 14 years later in 1978?

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1 A. Yes.

2 Q. And as indicated by the exchange among the  
3 Committee of Counsel regarding the NCI workshop on  
4 sidestream smoke in 1981?

5 A. Yes.

6 Q. Now did you also find in your review, Professor  
7 Jaffe, of the internal documents of the industry  
8 instances in which defendants used lawyers to  
9 suppress the potential disclosure of scientific  
10 research?

11 A. Yes.

12 Q. Would you turn to Exhibit 11178. This is a  
13 document that was produced from the files of BATCo  
14 Ltd.; is that correct?

15 A. That's correct.

16 Q. And it is a confidential memorandum from a Mr.  
17 M. J. Hardwick to three gentlemen who are listed at  
18 the top of the page; correct?

19 A. Yes.

20 Q. Do you understand that Mr. A. L. Heard worked in  
21 the research and development department of BATCo, and  
22 that he was head of biotechnology?

23 A. That's my understanding.

24 Q. And Mr. Hardwick, the author, is the manager of  
25 research and development-production at the

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1 Southampton research facilities of BATCo.

2 A. Okay.

3 Q. Now he indicates that the subject of the memo is  
4 "MATERIAL FROM BROWN & WILLIAMSON," and the date of  
5 the memo is January 9, 1985; correct?

6 A. Correct.

7 Q. All right. What does he report?

8 A. He reports that he got a phone call from someone  
9 named Ray Pritchard, and that he, that is, Mr.  
10 Pritchard, had received a letter from Dr. I. W.  
11 Hughes, who was with Brown & Williamson, indicating a  
12 mechanism for our sending scientific information to  
13 B&W. "In principle it will mean our mailing  
14 contentious information to a legal man called

15 Maddox" -- and he indicates he's not sure what  
16 company Mr. Maddox is with -- "with a covering letter  
17 from us saying that Millbank has asked that he," that  
18 is Maddox, "receive it."  
19 Q. Now as of this point in time, January of 1985,  
20 do you recall what position Dr. I. W. Hughes held at  
21 Brown & Williamson?  
22 A. I believe he was the president of Brown &  
23 Williamson.  
24 Q. President and CEO.  
25 A. Okay.

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1 Q. And do you understand that Mr. Pritchard, the  
2 gentleman who phoned Mr. Hardwick, would become the  
3 president and CEO of Brown & Williamson upon the  
4 retirement from that post of Mr. Hughes in 1986, the  
5 next year?  
6 A. Yes, that's my understanding.  
7 Q. All right. Is there further discussion of this  
8 incident in Exhibit 11180?  
9 A. That's correct.  
10 Q. Would you return to that, please.  
11 Once again we have a document that is on the  
12 letterhead of the British-American Tobacco Company  
13 Ltd., and this is a letter from Mr. Pritchard to Mr.  
14 Hardwick.  
15 A. Yes.  
16 Q. And it's January 10, 1985, so it's the next day,  
17 essentially, relative to the previous exhibit.  
18 A. That's correct.  
19 Q. Okay. Now what is Mr. Pritchard reporting to  
20 Mr. Hardwick in this letter?  
21 A. It says, "Would you please arrange for all  
22 reports and materials for worldwide distribution  
23 emanating from G.R. & D.C.," which is the BATCo  
24 research facility in England, "to be sent to Robert  
25 L. Maddox, Jr., of Wyatt, Tarrant & Combs," and it

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1 gives an address in Louisville, Kentucky. And then  
2 it says, "This firm should not be listed as a  
3 distributee in the documents nor should B&W. Any  
4 mail sent to Maddox should be accompanied by a simple  
5 covering letter indicating that BAT Millbank has  
6 asked that he should receive it."  
7 Q. The previous document refers to contentious  
8 documents. What is your interpretation of that term?  
9 MR. BLEAKLEY: Objection, Your Honor,  
10 there's no foundation for this witness being able to  
11 tell us what "contentious" means.  
12 THE COURT: Well you can give us Webster's  
13 definition, I guess.  
14 MR. BLEAKLEY: No, that -- that isn't what  
15 he asked for, Your Honor. He asked for him to  
16 interpret this document.  
17 THE COURT: Counsel, counsel, I told him  
18 what he could answer to the question.  
19 MR. BLEAKLEY: Okay. Well I also object on

20 the grounds that this witness has no competence to  
21 interpret documents discussing matters over which he  
22 has no personal knowledge, no foundation.

23 THE COURT: You may give us your definition  
24 of "contentious."

25 A. "Contentious" means material that people would  
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1 want to argue about.

2 Q. Now from the standpoint of competitive behavior,  
3 how would you characterize this incident?

4 MR. BLEAKLEY: Objection, Your Honor,  
5 there's no foundation for that either.

6 THE COURT: You may answer that.

7 A. Well what's happening here is that Brown &  
8 Williamson, which is an affiliate of BATCo, which has  
9 long-standing relationships whereby there's research  
10 that's done in the facility in the United Kingdom  
11 that is commercially useful and relevant for -- for  
12 B&W, is in -- from the -- from the president of B&W  
13 calling up and telling the people in England that  
14 material from the research facility in England should  
15 not go directly to B&W but instead should go to an  
16 attorney, one can only assume that that attorney was  
17 then expected to perform some kind of function  
18 that -- that may have involved not all of the  
19 material going on to Brown & Williamson, which is not  
20 what I would expect an aggressive competitor who is  
21 trying to get the maximum advantage out of the  
22 research of the affiliated companies to do.

23 MR. BLEAKLEY: Your Honor, I move to strike  
24 that answer in its entirety. It's sheer speculation.

25 THE COURT: The answer will stand.

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1 BY MR. GILL:

2 Q. Can you summarize for the members of the jury,  
3 then, Professor Jaffe, the various roles played by  
4 CTR, The Tobacco Institute, and the -- and the  
5 lawyers of the industry in connection with the  
6 suppression of unfavorable research information.

7 A. Well I think overall what we've seen is a  
8 picture whereby these various parts of the industry,  
9 the CTR, the TI, and then this group of lawyers which  
10 was drawn from all of the companies, essentially were  
11 engaged in a systematic effort to try to make sure  
12 that smokers, consumers of cigarettes, did not  
13 receive information that would tend to confirm their  
14 fears about cigarettes, but instead would receive  
15 this message that the controversy is still alive,  
16 that causation has not been proven, and that that  
17 was, as I indicated, an aspect of this overall  
18 agreement to suppress fundamental competition  
19 relating to smoking and health.

20 Q. How did this prong, then, advance the goals of  
21 that broader overall agreement?

22 A. Well I think that this particular aspect of the  
23 conspiracy accomplished three things within the  
24 broader objectives of the conspiracy. The first



1 MR. BLEAKLEY: No objection.  
2 THE COURT: Court will receive 13416.

3 BY MR. GILL:

4 Q. All right. This is a letter on the stationery  
5 of the U.S. Department of Health and Human Services,  
6 it's dated June 13, 1983, it's a letter addressed to  
7 Mr. Kornegay, the chairman of The Tobacco Institute,  
8 and it is from Edward Brandt, Jr., M.D., the  
9 Assistant Secretary for Health; is that correct?

10 A. That is correct.

11 Q. And in the upper right-hand corner it indicates  
12 that a copy of this letter to Mr. Kornegay has been  
13 sent to Ernest Pepples, Esquire, at Brown &  
14 Williamson.

15 A. Yes, it does indicate that.

16 Q. Do you understand that Mr. Pepples was the  
17 general counsel of Brown & Williamson at that time?

18 A. Yes.

19 Q. Do you also understand that the -- that the  
20 document was actually produced not from the files of  
21 The Tobacco Institute, but from the files of Brown &  
22 Williamson?

23 A. That's what it indicates at the top.

24 Q. All right. Would you explain the significance  
25 of this letter, Professor Jaffe, with respect to your

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1 opinions regarding warnings.

2 A. Yes. This is a letter from the government to  
3 Mr. Kornegay at The Tobacco Institute on the subject  
4 of warnings to appear on cigarette packs, and it  
5 discusses in the letter the position that the  
6 industry has collectively taken with respect to  
7 warnings.

8 Q. It indicates in the second paragraph that there  
9 was a first meeting in May of '83, and that Mr.  
10 Kornegay apparently set forth certain conditions on  
11 any new warning label, and then it lists those  
12 conditions.

13 A. Yes.

14 Q. So Mr. Kornegay is setting conditions with  
15 respect to the government's consideration of  
16 warnings.

17 A. Mr. Kornegay is taking -- is laying out the  
18 industry position on what those warnings should be,  
19 yes.

20 Q. And is it your understanding that Mr. Kornegay  
21 would be speaking for the membership of The Tobacco  
22 Institute at that time?

23 A. Yes.

24 Q. All right. And with respect to the conditions  
25 that he set forth, number two relates to addiction;

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1 does it not?

2 A. Yes. It says that the warnings should not use  
3 the term "addiction."

4 Q. And number five indicates that any new warnings  
5 should retain reference to the Surgeon General.

6 A. Yes, by indicating that the warning is coming  
7 from the Surgeon General, and avoiding an implication  
8 that the warning which is on the cigarette pack would  
9 be coming from the tobacco company instead.

10 Q. The manufacturer of the product.

11 A. The manufacturer of the product, yes.

12 Q. In economic terms, what significance does it  
13 have for the process of creative destruction if the  
14 manufacturer of a product issues warnings with  
15 respect to its use?

16 A. Well I think in the context of the agreement to  
17 suppress competition, the concern was that a warning  
18 that came from the tobacco companies themselves would  
19 have greater credibility with smokers than a warning  
20 from the government, and that was to be avoided.

21 Q. And if a manufacturer of any consumer product  
22 admits through the publication of a warning in  
23 connection with its product that there are hazards  
24 attendant to the use of the product, what type of  
25 stimulation does such a warning provide to the

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1 process of creative destruction?

2 MR. BLEAKLEY: Your Honor, Mr. Gill is  
3 leading again.

4 THE COURT: You are leading. Sustained.

5 BY MR. GILL:

6 Q. As an economist, Professor Jaffe, what are the  
7 types of things that spur the process of creative  
8 destruction with respect to the knowledge of a  
9 manufacturer regarding its products?

10 A. Well in -- in this context in terms of the  
11 smoking-and-health issue, as we've talked about, what  
12 would spur creative destruction would be increased  
13 demand by consumers for a new kind of product, and a  
14 warning from the manufacturer indicating that the  
15 product was harmful would tend to spur that demand.

16 Q. And the sixth condition cited with respect to  
17 the earlier meeting is that the warnings should not  
18 refer to specific diseases.

19 A. That's correct.

20 Q. Now a couple paragraphs down, Dr. Brandt from  
21 the government indicates that the government has  
22 accepted in essence the first five of Mr. Kornegay's  
23 conditions; correct?

24 A. That is correct.

25 Q. But he indicates that the government cannot

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1 agree with the lack of reference to specific  
2 diseases. And he states why?

3 A. Yes. He says, "To do so would, in my view, be  
4 an abrogation of our responsibility to inform fully  
5 the consumer of our current state of scientific  
6 knowledge as to the health risks of cigarette  
7 smoking."

8 Q. And then does Dr. Brandt indicate in the  
9 following paragraph that he's made a second  
10 proposal --



11 A. Yes.  
12 Q. -- to Mr. Kornegay?  
13 A. Yes, he does.  
14 Q. All right. And with respect to the paragraph  
15 that starts out, "Our second proposal," what was the  
16 nature of that?  
17 A. He says that that second proposal is consistent  
18 with those goals and that they have also eliminated  
19 all references to death as you requested in response  
20 to our first proposal that was previously submitted.  
21 Q. And then what does Mr. Brandt indicate in the  
22 final paragraph?  
23 A. It says, "In keeping with our discussion this  
24 morning, we are willing to delete the reference to  
25 habit-forming in our June 9 submission. However, we

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1 feel that the warning definitely needs to include  
2 reference to specific diseases. Please let me know  
3 if there is any flexibility in your stand on this  
4 matter."  
5 Q. Now Professor Jaffe, how did the collective  
6 refusal of defendants to place warnings on their  
7 products advance the goals of the conspiracy?  
8 A. Well the agreement not to put on warnings unless  
9 forced to do so by the government supported the  
10 conspiracy in two ways; by, as we talked about a  
11 minute ago, avoiding a situation in which the  
12 manufacturer would be associated with the information  
13 that the product was harmful, it reduced the chances  
14 that smokers were going to turn away from existing  
15 products and demand safer products, and in that way  
16 it protected the existing position of the  
17 manufacturers, and in addition, by undermining the  
18 demand for safer products along with the other  
19 components of the conspiracy, it generally suppressed  
20 this competitive contest that might otherwise have  
21 broken out and endangered the industry.  
22 Q. All right. Professor, are you ready to move now  
23 to a discussion of the fourth prong of the overall  
24 conspiracy?  
25 A. Yes.

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1 Q. In your review of the industry's internal  
2 documents, did you find documents that support your  
3 opinion that defendants conspired not to exploit  
4 health concerns in connection with attempts to  
5 develop safer cigarettes?  
6 A. Yes.  
7 Q. All right. Would you turn to Exhibit 11663. Is  
8 this a document that you've relied upon in connection  
9 with your opinions?  
10 A. Yes.  
11 MR. GILL: We'll offer Exhibit 11663.  
12 MR. BLEAKLEY: No objection.  
13 THE COURT: Court will receive 11663.  
14 BY MR. GILL:  
15 Q. All right. This is a document that was produced

16 from the files of Philip Morris; correct?  
17 A. Yes.  
18 Q. It's entitled "OPERATIONS DEPARTMENT  
19 PRESENTATION TO PHILIP MORRIS BOARD OF DIRECTORS,  
20 OCTOBER 28, 1964, RESEARCH AND DEVELOPMENT." Is that  
21 correct?  
22 A. That is correct.  
23 Q. And do we know who the author is of this  
24 document?  
25 A. Yes. Dr. Wakeham at his deposition indicated  
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1 that he was the author of this document.  
2 Q. Now in what way did this particular report  
3 discuss the development of a safer cigarette?  
4 A. Well on the very first page it describes -- this  
5 is now in 1964 --  
6 Q. Would this be in the last paragraph of that  
7 page?  
8 A. Yes, at the bottom --  
9 Towards the bottom of the page, Dr. Wakeham  
10 describes a sequence of events at Philip Morris. He  
11 says, in the second -- beginning in the second  
12 sentence of that paragraph, "Two years ago, in  
13 anticipation of a health crisis to be precipitated by  
14 the smoking and health report of the Surgeon  
15 General's Committee, we," meaning Philip Morris,  
16 "undertook to develop a physiologically superior  
17 product. For this we pioneered with the aid of two  
18 competent outside biological laboratories in the  
19 establishment of two new test methods involving the  
20 effects of cigarettes" -- sorry -- "cigarette smoke  
21 on (1) in vivo mucus flow and (2) respiratory  
22 dynamics. Our strategy here was that if we could  
23 define new acceptable criteria by which physiological  
24 performance of a cigarette would be judged and then  
25 develop a product or products meeting these criteria,  
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1 we stood an excellent chance of having our product be  
2 best in the market and receive valuable outside  
3 endorsement."  
4 Q. And then did Dr. Wakeham go on to describe in  
5 the next paragraph what Philip Morris did accomplish  
6 in connection with this project?  
7 A. Yes. He says, "With these tests as criteria, we  
8 did put together a charcoal filter product with  
9 performance superior to anything in the marketplace.  
10 That product was known as Saratoga. Physiologically  
11 it was an outstanding cigarette. Unfortunately then  
12 after much discussion we decided not to tell the  
13 physiological story which might have appealed to a  
14 health conscious segment of the market. The product  
15 as tested" -- sorry -- "The product as test marketed  
16 didn't have good taste and consequently was  
17 unacceptable to the public ignorant of its  
18 physiological superiority."  
19 Q. Is that report on the decision of Philip Morris  
20 with regard to the marketing of the Saratoga

21 cigarette consistent or inconsistent with your  
22 opinion regarding the prong of the conspiracy  
23 relating to an unwillingness to exploit for  
24 competitive purposes safer products in a manner  
25 relying on health fears?

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1 A. Well it's consistent. At least as described  
2 here by Dr. Wakeham, Philip Morris had a product  
3 which they believed, based on scientific tests that  
4 they had done, was physiologically superior to the  
5 products on the market at the time, but they  
6 concluded that they couldn't tell that story, that  
7 physiological story and because telling that story  
8 would have relied on health fears to -- to exploit  
9 the product, and as a result the product was test  
10 marketed but not tested successfully because, as Dr.  
11 Wakeham indicates, the public was ignorant of its  
12 physiological superiority.

13 Q. Did you find any other documents in any of the  
14 files of the other defendants who produced documents  
15 in this case in which there were attempts made to  
16 develop a safer cigarette?

17 A. Yes.

18 Q. Would you turn to Exhibit 11942, please.  
19 Is this a document that you've relied upon in  
20 support of your opinions?

21 A. Yes.

22 MR. GILL: We'll offer Exhibit 11942, Your  
23 Honor.

24 MR. BLEAKLEY: No objection.

25 THE COURT: The court will receive 11942.

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1 BY MR. GILL:

2 Q. This is a document produced from the files of  
3 British-American Tobacco Company Ltd.?

4 A. That's correct.

5 Q. And it's from the research and development  
6 establishment at Southampton?

7 A. Yes.

8 Q. And it indicates down below that that it's a  
9 confidential report, property of British-American  
10 Tobacco Company.

11 A. Yes.

12 Q. All right. If you go to the next page, what is  
13 the subject matter of the report that's contained  
14 there?

15 A. It says "NICOTINE ADMINISTRATION: ARIEL SMOKING  
16 DEVICES."

17 Q. All right. And it gives the date of the report?

18 A. Yes, which would be August 2nd, 1966.

19 Q. Based upon the European system.

20 A. The British system, yes.

21 Q. And the authors are --

22 Do you see any familiar names there?

23 A. Well Dr. Hughes, a Mr. Hook, Nicholl and Willis.

24 Q. And the report was issued by Dr. D. G. Felton?

25 A. Oh, yes, right.

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1 Q. Now if you'd go to Bates stamp page 892, we have  
2 here a discussion of this nicotine administration  
3 ARIEL smoking device.

4 A. Yes. It says, "Project ARIEL was a research  
5 topic aimed at the development of a smoking device  
6 from which a smoker can receive, in suitable form,  
7 sufficient nicotine to give satisfactory  
8 physiological and psychological responses,  
9 unaccompanied by the products of combustion and  
10 pyrolysis associated with normal cigarette smoking."

11 Q. And does this report indicated the nature of the  
12 different product design that ARIEL involved?

13 A. Yes, it does.

14 Q. All right. If you'd turn the page, about  
15 halfway down there's a section "Present Position."

16 A. Yes.

17 Q. See that?

18 Is it basically reporting on the status of this  
19 developmental product at that time?

20 A. Yes. It says, "ARIEL cigarettes have been  
21 assembled which will enable the smoker to obtain a  
22 required amount of nicotine with or without cigarette  
23 smoke. Two which show promise are described below,"  
24 and then there's a drawing of one of the versions  
25 that's referred to as a "Simple ARIEL with a

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1 Frangible Tube."

2 Q. And then two pages later at 985, does it show  
3 the design for the other version of the ARIEL  
4 cigarette?

5 A. Yes. This is described as the Composite ARIEL  
6 with a Frangible Tube" and has a slightly different  
7 design, including a different kind of filter that is  
8 not on the other design.

9 Q. To your knowledge, and based upon your review of  
10 the documents, was this particular cigarette ever  
11 marketed by British-American Tobacco Company or any  
12 of its affiliates?

13 A. No, it was not.

14 Q. Whatever became of this project, as best you  
15 could tell from reviewing the internal documents of  
16 BATCo?

17 A. The documents I've been able to find do not  
18 explain why the project was terminated. There's a  
19 sequence of documents through the '60s, the last  
20 reference to it is sometime in the late 1960s, and  
21 then there's no further information.

22 Q. Did you find other attempts to develop a safer  
23 cigarette based upon your review of the documents?

24 A. Yes.

25 Q. If you'd go to Exhibit 11523. Is this one of

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1 the documents you've relied upon in support of this

2 portion of your opinion?  
3 A. Yes.  
4 MR. GILL: We'll offer Exhibit 11523, Your  
5 Honor.  
6 MR. BLEAKLEY: No objection.  
7 THE COURT: Court will receive 11523.  
8 BY MR. GILL:  
9 Q. Now this is a document produced from the files  
10 of Liggett; is that correct?  
11 A. Yes, that's correct.  
12 Q. And we've got an indication in the upper  
13 right-hand corner of the name of a Mr. Africk?  
14 A. Yes.  
15 Q. We've got a date in the upper left-hand corner.  
16 Can you read that date?  
17 A. Yes, I believe it's January 25th, 1979.  
18 Q. And then there's a reference to "OPENING." Now  
19 what is being discussed on the first page of this  
20 document, professor?  
21 A. It says, "In order to better explain the  
22 significant importance of our XA project, we have  
23 asked Dr. Mold, our assistant director of research,  
24 to record his scientific review of this project. I  
25 would like to play this for you."

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1 Q. So is it your understanding that this document  
2 then sets out what it was that Mr. -- that Dr. Mold  
3 had to say to the board of directors in connection  
4 with this XA project?  
5 A. Yes, that is my understanding.  
6 Q. Okay. If you turn to Bates stamp page 591,  
7 please, Dr. Mold explains the purpose of the project  
8 there?  
9 A. Yes.  
10 Q. Can you comment on that, please.  
11 A. It says, "To introduce a major new brand into  
12 the U.S. market that will strengthen Liggett & Myers  
13 and make an important contribution to its future  
14 growth and profits.  
15 "To introduce a product offering with a  
16 significant and appealing consumer point of  
17 difference to any cigarette currently marketed."  
18 He states the objective is "To achieve a 1.6  
19 SOM," or share of market, "after 12 months." And  
20 then on this copy it's been written in that that  
21 "Equates to approximately 10 billion units. In  
22 excess of 150 million gross dollar business."  
23 Q. Does this appear to be a significant objective?  
24 A. Yes. This was expected at this time to be a  
25 significant product.

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1 Q. Based upon your review of the documents, what  
2 was happening to Liggett's market share at the time  
3 of the late '70s?  
4 A. Liggett's market share generally was declining  
5 at this time.  
6 Q. And with regard to the reference to a "consumer

7 point of difference," does that terminology have any  
8 impact with respect to the process of creative  
9 destruction?  
10 A. Yes. What this indicates is that this would  
11 have been a distinctly different product from the  
12 ones on the market at the time, the kind of  
13 potentially important long-term innovations that we  
14 would expect the process of creative destruction to  
15 bring forth.  
16 Q. On the next page of this exhibit, does Dr. Mold  
17 set forth the strategy to capitalize on this project?  
18 A. Yes.  
19 Q. All right. Directing your attention to the  
20 third item, "To position XA as a major new  
21 breakthrough product to smokers who are concerned  
22 about the smoking controversy." Does that confirm  
23 your earlier indication that Liggett regarded this  
24 matter as a significant developmental project?  
25 A. Yes.

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1 Q. All right. What else does Dr. Mold have to say  
2 with respect to strategy on this page as it might  
3 have any impact whatsoever with pursuing the process  
4 of creative destruction?  
5 A. Well he goes on to say that they're going to  
6 "capitalize on a heavy and sustained, hard-hitting PR  
7 program that:  
8 "Generates high-level of immediate awareness  
9 concerning the consumer point of difference."  
10 And he says it's going to present the "XA story  
11 in a complete and forthright way, communicating  
12 clearly that while Liggett does not believe that  
13 mouse-painting tests apply to humans, Arthur D.  
14 Little's replication of the original mouse-painting  
15 tests demonstrates our discovery of an effective  
16 means of treating 'tars' that reduce carcinomas,"  
17 that is, cancerous tumors, "by 70 to a hundred  
18 percent on mice."  
19 Q. So Dr. Mold is suggesting that this  
20 project -- or this product is a significant  
21 breakthrough, and it's his suggestion strategy-wise  
22 that the public be told about that?  
23 A. Yes.  
24 Q. Now did you find other documents from Liggett  
25 that reflect what occurred with regard to this

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1 project?  
2 A. Yes.  
3 Q. If you'd turn to 11513, please. Is this one of  
4 the documents that you've relied upon in forming your  
5 opinions?  
6 A. Yes.  
7 MR. GILL: We'll offer Exhibit 11513, Your  
8 Honor.  
9 MR. BLEAKLEY: No objection.  
10 THE COURT: Court will receive 11513.  
11 BY MR. GILL:

12 Q. This document was also produced from the files  
13 of Liggett; is that correct, Dr. Jaffe?  
14 A. Yes.  
15 Q. It is marked "CONFIDENTIAL" and it indicates  
16 that it concerns some initial observations on the  
17 patented cigarette project, and then it provides a  
18 background of the project.  
19 A. That's correct.  
20 Q. Now in the second paragraph on that first page,  
21 is there further information concerning the nature of  
22 this breakthrough cigarette that Liggett is  
23 attempting to develop?  
24 A. Yes. It says, "The new Liggett cigarette  
25 manufacturing process consists of treating

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1 conventional tobacco with palladium and nitrates.  
2 Liggett has also successfully developed a special  
3 filter to use with tobacco processed in this manner.  
4 The filter incorporates a specially treated active  
5 charcoal, the principal purpose of which is to remove  
6 irritant constituents of smoke and thereby to reduce  
7 toxicity. It also reduces nitrate emissions to  
8 normal levels."

9 Q. Then it goes on to indicate that "Testing of  
10 various cigarettes is now in its final phase to  
11 produce maximum taste acceptability and also to  
12 determine whether tumor incidence in test rats and  
13 mice can be virtually eliminated."

14 A. Yes.

15 Q. Now does the memo go on to discuss which  
16 compounds in cigarette smoke Liggett was attempting  
17 to target with regard to this project?

18 A. Yes, it does.

19 Q. If you turn the page, down at the very bottom of  
20 page two of this memo, what does it say in that  
21 regard at the bottom of page two?

22 A. It says, "It was shown that the tumor-causing  
23 activity of cigarette smoke condensate is primarily  
24 initiated by polycyclic aromatic hydrocarbon  
25 fraction," or PCAH, "fraction of the condensate. A

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1 polycyclic aromatic hydrocarbon is a multi-ring  
2 molecule containing carbon, hydrogen, and oxygen; it  
3 is produced by the combustion of tobacco."

4 Q. And then in the following paragraph on page  
5 three, does the author indicate what this substance,  
6 palladium, has got to do with targeting the  
7 polycyclic aromatic hydrocarbons?

8 A. Yes. Down -- sort of the middle of that long  
9 paragraph it says, "Palladium, an inert metal,  
10 apparently inhibits the formation of PCAH molecules  
11 by blocking molecular linkages of carbon, hydrogen,  
12 and oxygen."

13 Q. Does the author then go on to discuss some of  
14 the obstacles that the company faces in connection  
15 with this project?

16 A. Yes, it does.

17 Q. Could you turn to page seven. The author deals  
18 with the potential regulatory obstacles to the  
19 palladium cigarette program?

20 A. Yes.

21 Q. What does he report in that regard?

22 A. Well he indicates that they had potential  
23 concern. It says, "Despite the promise of  
24 significant public benefits which could result from  
25 the use of the patented cigarette manufacturing

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1 process, Liggett could encounter serious difficulties  
2 in the marketing and in the advertising of  
3 palladium-treated cigarettes. Either the Federal  
4 Trade Commission ('FTC') or the Food and Drug  
5 Administration ('FDA') or both, might attempt to  
6 prevent Liggett from advertising the  
7 non-carcinogenicity or non-tumorigenicity of the  
8 product without Liggett's first demonstrating the  
9 cigarette's effectiveness to the agencies'  
10 satisfaction."

11 Q. All right. And then on the next page, is there  
12 further discussion with respect to potential  
13 regulation by the FTC?

14 A. Yes, there is.

15 Q. Looking at the last paragraph on that page, what  
16 does the author indicate with regard to that?

17 A. It says --

18 The author says, "Whether the Commission could  
19 in fact issue such an order," and he's been talking  
20 about an order that would prohibit Liggett from  
21 marketing the product, he says, "Whether the  
22 Commission could in fact issue such an order and  
23 whether a court would uphold the order would depend  
24 upon whether Liggett's claims for the product were  
25 misleading or deceptive in any way."

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1 Q. What's your interpretation of that language?

2 A. Well what the author seems to be saying is that  
3 the issue that they would face with respect to the  
4 FTC was that they couldn't market the product in a  
5 way that was false or misleading, they would have to  
6 figure out a way to market it that the FTC would not  
7 determine to be false and misleading.

8 Q. And that would require what type of data in  
9 support of claims?

10 A. Well if you --

11 You would have to have scientific information  
12 that would be valid and could be demonstrated to be  
13 valid that could be presented to consumers so that  
14 you were not possibly making a claim that was false  
15 or misleading.

16 Q. And have we seen indication that Liggett was  
17 attempting to develop that very type of data?

18 A. Yes, in fact they were.

19 Q. Now if we go to page 14 of this memorandum, does  
20 the author provide some concluding observations with  
21 respect to this issue of potential FTC regulation?



22 A. Yes. In the first paragraph there of the  
23 conclusion, the author says, "As the foregoing brief  
24 and preliminary discussion underscores, there are  
25 substantial regulatory obstacles to the marketing and

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1 advertising of a cigarette produced pursuant to the  
2 patented technology. However, they are not  
3 insurmountable."

4 Q. Now did Liggett's lawyers get involved in this  
5 project?

6 A. Yes.

7 Q. Would you turn to Exhibit 11482, please. Is  
8 this a document that you've relied upon in support of  
9 your opinions, Professor Jaffe?

10 A. Yes.

11 MR. GILL: We'll offer Exhibit 11482.

12 MR. BLEAKLEY: No objection.

13 THE COURT: Court will receive 11482.

14 We'll take just a 10-minute recess.

15 MR. GILL: Fine, Your Honor.

16 (Recess taken.)

17 THE CLERK: At this time court will recess  
18 and reconvene tomorrow morning at 9:30.

19 (Recess taken.)  
20  
21  
22  
23  
24  
25

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